

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."), R.J.
REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and BROWN
& WILLIAMSON TOBACCO CORP.,
Individually and as Successor to the
AMERICAN TOBACCO COMPANY,

Defendants.

COPY

CASE NO. 00-1731 CA01

TRIAL

Volume 4

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Tuesday, March 20, 2001, at 1:45 p.m.

Miami, Florida

Taylor, Jonovic, White & Gendron

(305) 358-9047

1 APPEARANCES:

2 On behalf of the Plaintiff :

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8 DOUGLAS McCARRON, ESQ.9 and
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14 and
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and21 On behalf of the Plaintiffs' Committee on Tobacco
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On behalf of Defendant R.J. Reynolds:

Taylor, Jonovic, White & Gendron

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7 and
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11 BY: DOUGLAS J. CHUMBLEY, ESQ.

12 On behalf of Defendants Philip Morris and Lorillard:

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16 BY: KENNETH J. REILLY, ESQ.
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19 On behalf of Defendant Brown & Williamson:

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23 BY: ANTHONY N. UPSHAW, ESQ.

24 On behalf of Defendant Lorillard:

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1 (THEREUPON, the following proceedings were held:)

2 THE COURT: I think we can take up this
3 motion in limine while they set up.

4 MR. HUNTER: Judge, could I be heard
5 preliminarily on this motion in limine?

6 THE COURT: Certainly.

7 MR. HUNTER: I've been to Vermont twice
8 now to take the deposition of Dr. Irvin. His
9 deposition and his qualifications and his
10 testimony started a long time ago. And I got
11 this motion in limine, which is
12 approximately -- very thick, delivered to me
13 today.

14 This is something that I think is unfair.
15 I think it's happened to me already in the
16 short duration we've been here and that is, the
17 morning of an important day of proceedings, I
18 get hand delivered to me a gigantic motion that
19 somebody has been working on obviously for days
20 and days if not hours and hours.

21 This has all kinds of case law citation.
22 It would be impossible for me to be able to
23 attend to the matters before this Court and to
24 have any kind of -- to have any kind of
25 response, a genuine response to this Court on

1 this motion with no time to prepare.

2 And I would ask the Court to not require
3 argument on this issue, let us proceed to give
4 opening statement to the jury; and when I call
5 Dr. Irvin, since they chose not to bring
6 anything before the Court in an earlier basis,
7 that I be able to put him on the witness stand
8 and try to qualify him to give him the opinions
9 that they know he's going to give, since
10 they've heard his testimony, and the Court
11 entertain objections at that time as the
12 testimony proceeds.

13 But to try to drop into my lap an
14 extensive motion in limine right before I'm
15 about to give an opening statement is
16 impossible for me to respond to.

17 THE COURT: Mr. Reilly.

18 MR. REILLY: Your Honor, the reason we
19 filed this motion now is because this really is
20 the earliest opportunity we've had to make this
21 motion before Your Honor in light of the
22 bifurcation of Dr. Irvin's deposition.

23 Your Honor will probably recall that
24 Dr. Irvin is the guy who halted his own
25 deposition and said he didn't want to

1 participate anymore because he was irritated by
2 the process. Your Honor required that
3 plaintiffs' counsel reproduce him. He did and
4 we've now had an opportunity to complete his
5 deposition. Now is the time for a Frye motion.
6 You can't file a Frye motion until you've
7 completed the deposition of the expert.

8 There are clearly -- I don't know whether
9 other motions will be filed on the mornings of
10 further proceedings in this case, I can't
11 predict that. But I do know that this is a
12 very important motion. Merely because it
13 involves work doesn't mean that we don't go
14 ahead and do the work.

15 We now have exactly what Dr. Irvin
16 maintains the basis for his opinions is, and to
17 the extent that it rests on speculation, which
18 he can't do, and to the extent that it is the
19 expression of opinions that doesn't satisfy
20 Frye, are not based on reliable scientific
21 principles and methodology generally accepted
22 in the scientific community, he shouldn't be
23 able to testify to it.

24 Likewise, such opinions shouldn't be
25 communicated to this jury even in opening

1 statement.

2 THE COURT: Well, there's a couple of
3 thoughts on that. I always found the most
4 dangerous thing to do in front of a jury is to
5 tell them something in opening statements you
6 couldn't prove. Because if the other side is
7 going to pay attention, the other side is going
8 to remind the jury in no uncertain terms what
9 was said in opening statement and what they
10 were able to produce to the jury for their
11 consideration.

12 That to me is probably the most damning
13 thing that destroys cases faster than anything
14 else. Because if you lose credibility with the
15 jury, you're going to lose outright. And how
16 you behave and how you act and what you say in
17 front of a jury has an impact. And they either
18 believe you or they don't. If they don't
19 believe you as the attorney representing
20 somebody -- representing anybody, you're in
21 potential deep do-do, to put it mildly.

22 So what I'm going to do is this, since
23 this is the last -- it just came in today and
24 they have not had a chance to read it. I
25 barely got through it over the lunch break and

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1 obviously didn't have a chance to read all of
2 the attachments but to study the motion.

3 I'm going to take this up when he gets
4 ready, prior to putting on Dr. Graham.

5 MR. REILLY: Irvin.

6 THE COURT: Irvin, I'm sorry.

7 MR. REILLY: Everybody starts with an "I"
8 or "E" around here except Reilly.

9 MR. HUNTER: Your Honor, I'd like the
10 Court's guidance on use of exhibits during
11 opening. I know from Broin 1, Mr. Rosenblatt
12 argued very vigorously that the defendants not
13 be permitted to show these numerous exhibits
14 that they had prepared because they took on the
15 appearance of evidence and argument.

16 I know they've got a whole list of things
17 that they haven't shown me that they intend to
18 use. And I would ask, if they intend to use
19 any sort of a prop during opening statements,
20 that they first show it to us so we can look at
21 it.

22 And my suggestion is that we proceed to
23 give an opening statement to this jury without
24 such aids.

25 MR. REILLY: Your Honor, clearly we object

1 to not being able to use charts of some kind to
2 summarize what we --

3 MR. HUNTER: I didn't finish up.

4 And Judge Kaye denied them the opportunity
5 to --

6 MR. REILLY: That is utter nonsense, you
7 know how I know? I know because I gave opening
8 statements in Engle.

9 MR. HUNTER: No, I'm talking about Broin.

10 MR. REILLY: Well, you commented on Broin
11 and Engle. I appeared before Judge Kaye for a
12 year. I gave two opening statements, I used
13 boards to summarize exactly what the evidence
14 was going to be.

15 THE COURT: My general rule is that if you
16 don't show it to the other side previously or
17 it hasn't already been marked in evidence, then
18 you don't get to use it. So if you want to
19 show them what you're going to use and they can
20 look at it, see if they have any fair comment.

21 Who knows what they're going to agree to
22 and not agree to?

23 MR. REILLY: Maybe we should take five
24 minutes and plaintiffs' counsel should show us
25 what he plans to use.

1 For example, I don't know if he plans to
2 put photographs before the jury.

3 THE COURT: That's one of the reasons that
4 I thought it might be fun to have some of the
5 exhibits already marked that you all knew, all
6 of you, both sides know that you're going to be
7 putting into evidence.

8 And my court clerk asked for it, I asked
9 for it, and we haven't gotten very far. And
10 partly through my own fault. But it comes down
11 to look at it, we'll take five minutes. You
12 all go over it, see what you have.

13 (Discussion off the record.)

14 MR. REILLY: Apparently he's not using
15 any. You're not using anything in your opening
16 statement; you're just going to stand up and
17 talk.

18 MR. GERSON: Word pictures.

19 MR. REILLY: Word pictures, perfect.

20 MR. HUNTER: Let me start with Mr. Reilly,
21 first, if I can.

22 Judge, could I proceed in my own fashion
23 without Mr. Reilly directing my presentation?

24 THE COURT: I think that sounds reasonable
25 to put them all up there.

1 MR. REILLY: Don't hurt them.

2 THE COURT: He won't hurt them.

3 MR. HUNTER: I know this is argued in
4 Broin 1, kept out because this is a type of
5 exhibit which is not even an exhibit, it's a
6 demonstrative aid. They intend to get up here
7 and show a picture of the Sweet & Low tablet
8 and point to the Orange Bowl and say that a
9 microgram is this type of unit compared to that
10 type of a unit.

11 This is picture charts which all take into
12 the nature of -- all seem to be in the nature
13 of evidence that's not been admitted yet or
14 argument.

15 And this shows pictures of cigarettes and
16 very -- I don't know that that's going to be
17 established in the evidence in this case, that
18 that's the way smoke comes out of a mouth. In
19 fact, I'm going to deny that it comes out that
20 way.

21 And this chart -- now I'm showing a chart.
22 The first chart was called what, Phil? The one
23 with the Sweet & Lows, for the record?

24 Well, this chart is called: What is
25 environmental tobacco smoke? Which I dispute

1 that smoke comes out of a smoker's mouth like
2 that also.

3 This chart is probably fairly benign, but
4 the point is, let me show what Mr. Engram has
5 in mind.

6 MR. REILLY: Wait, finish with mine.

7 THE COURT: Let's stay with just
8 Mr. Reilly's right now.

9 MR. HUNTER: This chart, or this big
10 picture that I'm showing you, I can't tell what
11 it is, but it looks to be a computer animation
12 of the inside of an airplane.

13 THE COURT: Hold on a second, please.

14 (Discussion off the record.)

15 THE COURT: Okay, I'm sorry.

16 MR. HUNTER: I object to this -- I object
17 to every chart. I object to using these charts
18 in opening statement. They've never been
19 disclosed to me, they've never been listed,
20 they didn't list these on their exhibit list.

21 These are all demonstrative aids. I've
22 even alerted the position to the Court. This
23 demonstrative aid seems to be almost a
24 photograph of an interior of an aircraft with a
25 bunch of lines, which I'm not prepared to -- I

1 don't know what that is and I haven't agreed to
2 it and I dispute it.

3 This is domestic versus international
4 flights, and it has 1993, 1994, 1995, 1996 bar
5 charts. I deny that this is accurate. I've
6 never seen it before, it's never been shown to
7 me, I don't know if it's accurate, but there's
8 no evidence that's been presented by proffer or
9 anything else to show this is accurate. I
10 don't think it should be used in opening until
11 a foundation has been laid for it.

12 The next chart shows agents that flight
13 attendants are exposed to that can affect their
14 health.

15 First of all, if they're going to make an
16 argument on causative, you have to put on a
17 witness that says that this agent did, within a
18 reasonable degree of probability, affect
19 Mrs. Fontana's health. But also again there's
20 no evidence before this jury that I can tell
21 the Court with any -- I don't know how they're
22 going to prove that these things can affect
23 their health; and if they can't prove that they
24 did affect the health of Marie Fontana, I
25 object to it, because in order to show

1 alternative causation, they have to show us
2 more likely than not that one of the agents
3 they contend was an alternate cause did have an
4 affect on the plaintiff.

5 That all has to be the subject of
6 testimony that will come in that I can dispute
7 and try to prevent. But when the bell rings,
8 it's not anything --

9 THE COURT: Okay, I've got your position.

10 MR. REILLY: Your Honor, none of these
11 blow-ups, none of these depictions are anything
12 more than the words I am going to say to this
13 jury. All they are -- I could paint a visual
14 image or I can make a verbal image. This is
15 not evidence, and I'm not representing that
16 it's evidence.

17 And I'm delighted that Your Honor tell
18 them that nothing that is said or nothing
19 that's shown on a board is evidence in this
20 case.

21 As a matter of fact, Your Honor, you
22 probably always say that anyway. But I've
23 never been in a trial where you couldn't employ
24 a visual aid to go along with the words you use
25 to describe what the evidence is going to be in

1 the case.

2 Now, Mr. Hunter can spend all day long
3 telling this jury that this isn't how a smoker
4 exhales or how the smoke comes out, I don't
5 care. But all it is is a demonstrative to say
6 to the jury: Look, there's a difference
7 between mainstream smoke, sidestream smoke and
8 environmental tobacco smoke.

9 And all I'm going to tell them is: Look,
10 clearly this isn't a person, but it's a
11 depiction of a cigarette and how a person takes
12 a puff on a cigarette, that's all.

13 I've never been in a trial where I was not
14 permitted to just simply make a representation,
15 just a verbal image, along with a
16 demonstrative, that helps the jury understand
17 what the evidence is going to be.

18 Is it evidence? Clearly not. Am I
19 obligated to put it on an exhibit list?
20 Clearly not. You don't list things that are
21 not exhibits on an exhibit list.

22 Matter of fact, I think it's a little
23 ironic that Mr. Hunter's boards are now in the
24 back of the room because he's decided to play
25 this game.

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1 MR. HUNTER: They're right there.

2 MR. REILLY: But your staff told me that I
3 couldn't look at them because you weren't going
4 to use them now.

5 Now, the fact of the matter is that
6 demonstrative aids are used in every opening
7 statement.

8 Now, Mr. Hunter said: I dispute that.
9 Then he said: I don't know if it's accurate or
10 not.

11 So I don't know how he disputes it, but
12 the fact of the matter is that Your Honor
13 referred a moment ago, if you say it to the
14 jury and you don't end up proving it, you've
15 hung yourself out. And I agree with that.

16 We didn't argue this motion on Dr. Irvin
17 and you let plaintiffs' counsel say -- you're
18 going to let him say whatever he wants to say
19 about Dr. Irvin and Dr. Irvin's opinion.

20 This isn't even an opinion of an expert
21 who is going to come testify. These are
22 documents that we've stipulated to in this
23 case, that I've simply gathered together,
24 looked at and decided that these are the
25 appropriate numbers.

1 If they turn out not to be, Mr. Hunter
2 will take this board in closing argument and
3 he'll say: Remember when Mr. Reilly put this
4 board up in front of you and he told you that
5 this is what the evidence is going to be?
6 Well, it wasn't. She didn't fly 186 times --
7 matter of fact, this number comes from his
8 stuff. He'll say, you know what? She didn't
9 fly 186 flights in 1995 and 149 of them weren't
10 domestic flights. But that's always what
11 happens.

12 You know what? I've never even seen a guy
13 make an argument like this. What is this?
14 It's just a depiction of the inside of an
15 airplane.

16 Am I going to tell these people this is
17 the airplane Ms. Fontana flew on? Heck no.
18 What's the point of this? The point of this is
19 to give these folks a visual image of how the
20 air flow pattern is on airplanes with a
21 ventilation system. That's all. It's just an
22 aid to help them understand what I'm talking
23 about.

24 We're taking people right off the street,
25 we're bringing them into a lawsuit that

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1 involves a subject matter they've never even
2 dreamed of. And all I'm providing them with is
3 a visual aid to understand the words that I'm
4 talking about. But if you say to these people:
5 Look, you're going to see a bunch of
6 demonstratives here that they're not evidence
7 in this case, perfect, tell them that, they're
8 not evidence in this case.

9 I'm in 100 percent agreement with that.
10 But that doesn't mean I can't use them to help
11 tell the tale of what the evidence is going to
12 be in this case. That's all opening statement
13 is, it is not evidence. This is not evidence
14 and Judge Kaye has never permit -- Stanley
15 Rosenblatt or anybody else to not allow the use
16 of these kind of visual aids in the course of
17 an opening statement.

18 Granted, I wasn't there for Broin, but I
19 was there for a year of Engle and I gave two
20 opening statements, and I used these very same
21 kinds of visual aids in both those opening
22 statements, both of them.

23 There is nothing wrong with these things,
24 and Mr. Hunter can't show you a case that says
25 what he's talking about. I guarantee you that.

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1 MR. HUNTER: Judge, just on Dr. Irvin, I'm
2 not offering anything other than traditional
3 opening statement of what I expect the evidence
4 to be. But these types of charts, and I'm now
5 showing Mr. Engram's charts, these go beyond a
6 description of the jury. These are
7 argumentative. He's going to show this jury,
8 and they're going to have note pads, that the
9 definition of chronic bronchitis, and he has
10 the presence of chronic productive cough for
11 three months in each of two successive years.

12 That is a definition subscribed to by some
13 of the witnesses in this case, but it is going
14 to be one that I don't accept. He can tell the
15 jury that they're going to hear a medical
16 definition of chronic bronchitis, and he can
17 tell the jury what it is. But to get up there
18 and put a chart there in front of them is
19 argumentative, it's not evidence yet, and it
20 takes on, no matter how you try to instruct the
21 jury, it takes on the appearance of evidence to
22 them that they are not going to be able to
23 erase.

24 I know for a fact that Judge Kaye in
25 Broin 1 did not allow the defense to use any of

1 these demonstrative aids. I know for a fact.
2 I read the transcript.

3 Now, an opening statement is a statement
4 that the attorneys make to the jury. It has
5 always been oral, traditionally been oral, with
6 sometimes a stipulated piece of evidence that
7 the parties stipulate to beforehand, which the
8 defendants have not attempted to do with me.
9 They have never shown me these exhibits or
10 these demonstrative aids, they've never listed
11 them.

12 And I submit to the Court that the
13 traditional manner in which the attorneys give
14 an opening statement is they tell the jury what
15 they expect the evidence to be, and they call
16 the witnesses and introduce evidence. And if
17 the witness satisfies the predicate that he
18 needs a chart in order to explain or assist him
19 in explaining his testimony because of its
20 particular nature to the jury, then and only
21 then is he able to use a demonstrative aid.

22 Now, I don't know if they'll ever
23 establish that predicate, because we're here
24 before the trial has even started. But to
25 allow counsel to have about 20 to 25 exhibits

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1 which are argumentative, appear to be in the
2 nature of evidence, is so prejudicial to the
3 plaintiffs that I cannot recover from. And I
4 ask that the Court restrict opening statements
5 to the traditional manner in which we give
6 opening statements, that is, to limit the
7 attorneys to oral presentation.

8 MR. ENGRAM: Your Honor, may I respond
9 with respect to my exhibits?

10 MR. HUNTER: These might be appropriate in
11 closing and I agree. It might be appropriate
12 to refer back.

13 MR. ENGRAM: Your Honor, this case does
14 involve complex medical issues, it involves at
15 least five different disease processes. What I
16 have done is I have used the plaintiffs' own
17 witness, Dr. Charles Irvin, who said that he
18 sat on these committees of the American
19 Thoracic Society in developing or reviewing
20 statements on sarcoidosis, chronic obstructive
21 pulmonary disease and standardization for
22 spirometry.

23 What we have here, taken verbatim from the
24 American Thoracic Society statement on chronic
25 obstructive pulmonary disease, is the ATS

1 definition of chronic bronchitis.

2 So to say that he wasn't on notice, these
3 exhibits were used during Dr. Irvin's
4 deposition, he made a great big deal about the
5 fact that he had viewed them and approved them
6 and had been on the committees of two of the
7 four. There's no element of surprise here,
8 Your Honor.

9 Then the other outtakes that I have are
10 from plaintiffs' own exhibits, one of these
11 books that's this thick, I have pulled out a
12 couple of pages or a couple of references from
13 three pages. I have three pages of medical
14 records that the plaintiff has taken out of
15 this notebook.

16 I can highlight what I think the evidence
17 is going to be in this case, Your Honor. We've
18 stipulated, or Your Honor has ruled with
19 respect to some of this information, that it's
20 going to be admissible, and we've stipulated
21 it's the authenticity of the medical records.

22 Then the other exhibits, the exhibits
23 attached to depositions, are identified on
24 exhibit lists as potential exhibits in this
25 case.

1 There is no surprise here, Your Honor.
2 This is the year 2001. And when we do opening
3 statements, we do it in a way that can convey
4 our thoughts that's most receptive to a jury,
5 and people understand things more than just by
6 hearing them.

7 THE COURT: All right, everybody has been
8 playing this game about not disclosing what
9 they in fact are going to do and, in fact, what
10 they're going to say. And we haven't been able
11 to get the exhibits which everybody knows
12 should have been marked and could have been
13 marked, with a few exceptions where there would
14 be problems over them.

15 So my general rule, and has been in the
16 past and probably will remain until somebody
17 tells me I'm doing something wrong, and that
18 is, unless the parties agree to demonstrative
19 aids being used, I'm not going to allow them.

20 So we're going to have to go back to the
21 traditional way of talking to jurors, and I
22 have no problem in thinking that the jurors can
23 understand a well spoken word. So they are --

24 MR. REILLY: Your Honor, can we draw?

25 THE COURT: You can draw anything you want

1 to draw.

2 MR. REILLY: Can we have an easel and draw
3 on it?

4 THE COURT: You can write what you want to
5 write. But I'm going to keep these formal
6 exhibits out until they're going to be
7 introduced as demonstrative aid during the
8 testimony of a witness.

9 MR. REILLY: For example, Your Honor, I
10 wouldn't use -- all this is --

11 Let me show you something. Take a look at
12 this, your Honor. I'm never going to use that
13 with a witness, because it isn't what a witness
14 is going to address. This is what I'm going to
15 tell the jury are the subjects that I'm going
16 to address in my opening statement.

17 All it is is a little summary so that they
18 can be aided in following along with my opening
19 statement.

20 Now, what I'm going to tell them is, the
21 issue that I'm going to address is how much
22 environmental tobacco smoke was Ms. Fontana
23 exposed to.

24 And there are three categories in which
25 this evidence is going to come in in this case,

1 that we're going to present in this case. All
2 this does is help the jury follow my statement.
3 It doesn't provide them with any evidence. It
4 doesn't provide them -- as a matter of fact,
5 you said that we've been playing a game about
6 not disclosing things on exhibit lists.

7 These things would never appear on an
8 exhibit list ever, because they are not
9 exhibits. All they are is demonstrative aids
10 that help the jury follow along with what you
11 say the evidence is going to be.

12 Now, what's happening here -- let me tell
13 you something, I said I wasn't in Broin and I
14 wasn't. But I was present for the first -- for
15 the opening statement in Engle, the very first
16 opening statement in Engle by both sides.

17 Mr. Rosenblatt used visual aids, and for
18 example, Mr. Heim, who was representing my
19 client in this case, used a time line. Mr.
20 Rosenblatt didn't object to it, and I have a
21 time line here.

22 MR. REILLY: This lady's history spans
23 20-some years, 25 years of flying on airplanes.
24 There is no way that this jury can possibly
25 follow in 45 minutes listening at the end of

1 the day. I'm the guy who is going to get
2 disadvantaged here, because I have the last
3 opening statement today. And I'm going to have
4 to explain to this jury the flying history of
5 Ms. Fontana to explain this part of my opening
6 statement.

7 How often was she in the environment?
8 Sure, I can just say to the jury: You know
9 what? Ms. Fontana flew for 26 years, or 24
10 years, from 1972 to 1996. And I can just say
11 to them the events that occurred during the
12 course of that time frame.

13 Will they get it? Will they walk out of
14 this courtroom with one date in their heads?
15 Not one.

16 Why are we doing that to them?

17 THE COURT: That's a pretty low opinion of
18 jurors.

19 MR. REILLY: It's a fact of life. There
20 are studies all over this country and all over
21 the world that talk about how people retain
22 information. And they retain it far better if
23 they both hear it and see it. And what Mr.
24 Hunter wants to do -- and Mr. Heim put up a
25 time line just like this to talk about the

1 major events that occurred in the history of
2 tobacco.

3 Now, this is not a time line about the
4 history of tobacco, this is a time line about
5 certain events that I'm going to talk about,
6 that are directly related to Ms. Fontana's life
7 as a flight attendant.

8 Now, can I say them all? Sure. Can I
9 write them all? Could I draw a time line on
10 this pad? Sure, I could. But I can't do it in
11 45 minutes.

12 All this does -- you've given me, as a
13 matter of fact, you've given me 30 minutes
14 because that's all I've got. This helps me
15 tell this story in 30 minutes, not in an hour
16 and a half, if I had to draw it and write on it
17 and do all that stuff.

18 THE COURT: Okay, briefly, Mr. Hunter.

19 MR. HUNTER: Judge, you've ruled. You
20 couldn't be more clear; and as soon as you did
21 rule, he got up and made his same argument
22 again all from ab initio. He even showed you a
23 new chart which I haven't seen.

24 These all may be appropriate in summation.
25 But I'd also like to bring to the attention to

1 the Court these are the same defendants that
2 argued to you that we should have a 48 hour
3 rule, that I have to show them 48 hours ahead
4 of time.

5 They had this entire arsenal of charts and
6 demonstrative aids and never once even inferred
7 they had this. Never listed, never given to
8 me. And I don't want to reargue this because
9 you've ruled very clearly that we're going to
10 proceed under traditional manner.

11 THE COURT: Do me one favor. Look and see
12 if there's any mistakes in the time line.

13 MR. HUNTER: I don't know that the CAB
14 ordered commercial airlines to separate smokers
15 and nonsmokers in 5/73. I know she was working
16 prior to that. I don't know that the TWA
17 flight attendant's strike is necessarily
18 correct, I don't know that that's relevant,
19 whether she attended the Gold Coast School for
20 Real Estate.

21 I don't know how they're going to work
22 that into their argument, but maybe they are.
23 She works at Andy's Realty for three months. I
24 don't know that. She returns, smoking banned.

25 I'm not sure there's anything inaccurate

1 on there and I wouldn't represent to you that
2 it is.

3 THE COURT: This is what I'm going to do,
4 all of the demonstrative aids except the time
5 line are out.

6 And Todd, can we bring the jury in?
7 We have an hour and a half per side.

8 (The jurors entered the courtroom.)

9 THE COURT: Good afternoon, ladies and
10 gentlemen. Hope you all had a good lunch and
11 you're ready to start work.

12 What I'm going to do now is to read to you
13 the preliminary statement. It reads as
14 follows:

15 Members of the jury, please accept the
16 following as the Court's preliminary
17 instruction.

18 This is a civil case involving a disputed
19 or claims between the parties. The parties are
20 the plaintiff, Marie Fontana, and the four
21 defendants, Philip Morris Incorporated, R.J.
22 Reynolds Tobacco Company, Lorillard Tobacco
23 Company and Brown & Williamson Tobacco
24 Corporation.

25 Plaintiff is a former flight attendant.

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1 She is a lifelong nonsmoker. Defendants are
2 manufacturers of cigarettes.

3 Plaintiff has sued the Defendants for
4 injuries she claims were either caused by her
5 exposure to secondhand smoke, or environmental
6 tobacco smoke, ETS, or which constituted an
7 aggravation or exacerbation of an existing
8 condition in the aircraft cabins while she was
9 a flight attendant for Trans World Airlines.

10 It has not been raised as a defense in
11 this case that the plaintiff, Marie Fontana the
12 plaintiff in this case, has in any way
13 contributed to her own injuries, and you are
14 instructed not to consider any such argument in
15 reaching your verdict.

16 I further instruct that it has not been
17 raised as a defense in this case that the
18 airline or any other entity is at fault and/or
19 contributed to Marie Fontana's injuries, and I
20 instruct you not to consider any such argument
21 in reaching your verdict.

22 In fact, the question of fault is not for
23 your consideration in this case. You are to
24 determine only whether the plaintiff Marie
25 Fontana's exposure to secondhand smoke,

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1 environmental tobacco smoke, ETS legally
2 resulted in damages sustained by her.

3 On this issue, I instruct you that there
4 is a rebuttable --

5 Let me start over.

6 On this issue, I instruct you that there
7 is a rebuttable presumption that exposure to
8 secondhand smoke, or environmental tobacco
9 smoke, is harmful to one's health and can cause
10 chronic bronchitis, emphysema, chronic
11 sinusitis and chronic obstructive pulmonary
12 disease in healthy nonsmokers.

13 Notwithstanding the above, it is the
14 plaintiffs' burden to prove that, 1, she has
15 one of the diseases enumerated above or an
16 aggravation of an existing condition and, 2,
17 that her exposure to secondhand smoke was the
18 specific cause of the disease or aggravation
19 claimed by her.

20 Some of the evidence to be introduced in
21 this trial will be the testimony by live
22 witnesses. Some of the evidence will be in the
23 form of documents, such as medical records. In
24 addition, some of the evidence will be
25 testimony which has been videotaped from a

1 previous trial conducted several years ago. In
2 that trial, issues regarding environmental
3 tobacco smoke were involved.

4 You are to consider and weigh the
5 testimony of the witnesses presented by
6 videotape as though each witness had testified
7 here in person. However, you should not
8 speculate about or consider any other subject
9 or issue regarding the previous trial depicted
10 in the videotapes.

11 Your verdict in this case must be based on
12 the evidence received during this trial and the
13 law on which I will instruct you at the end of
14 this case.

15 Before proceeding further, it will be
16 helpful for you to understand how a trial is
17 conducted. In a few moments, the attorneys for
18 the parties will have an opportunity to make
19 opening statements in which they may explain to
20 you the issues in the case and summarize the
21 facts that they expect the evidence will show.

22 Following the opening statements the
23 witnesses will be called to testify under oath.
24 They will be examined and cross examined by the
25 attorneys. Documents and other exhibits also

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1 may be received in in evidence.

2 After all the evidence, the attorneys will
3 again have the opportunities to address you and
4 make their final arguments to you. The
5 statements that the attorneys now make and the
6 arguments that they later make are not to be
7 considered by you to be considered by you
8 either as evidence in the case or as your
9 instruction on the law. Nevertheless, these
10 statements and argument also are intended to
11 help you properly understand the issues, the
12 evidence and the applicable law, so you could
13 should give them your close attention.

14 Following the argument by the attorneys, I
15 will instruct you on the law.

16 You should give careful attention to the
17 testimony and the other evidence as it is
18 received and presented for your consideration
19 but, you should not form or express any opinion
20 about the case until have you received all the
21 evidence, the arguments of the attorneys and
22 the instructions on the law from me. In other
23 words, you should not form or express any
24 opinion about the case until you are retired to
25 the jury room to consider your verdict after

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1 having heard all of these matters.

2 This case must be tried or heard by you
3 only on the evidence presented during the trial
4 in your presence and in the presence of the
5 attorneys and myself. You must not conduct any
6 investigation of your own. Accordingly, you
7 must not visit any of the places described in
8 the evidence or the scene of the occurrence
9 that is the subject of the trial unless I
10 direct to you view the scene.

11 Also you must avoid reading newspaper
12 headlines and articles in reference to this
13 case and trial. You must also avoid seeing or
14 hearing television and radio comments or
15 accounts of this trial while it is in progress.

16 If you haven't seen before, there is a
17 T.V. camera in the room. And I already
18 mentioned about reading the newspaper and I
19 want you to abide by it religiously.

20 The attorneys are trained in the rules of
21 evidence and trial procedure, it is their duty
22 to make all objections they feel are proper.
23 When a lawyer makes an objection, I will either
24 overrule or sustain the objection. If I
25 overrule an objection to a question, the

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1 witnesses will answer the question. When I
2 sustain or uphold an objection, the witness
3 cannot answer the question. If I sustain an
4 objection, you must not speculate on what might
5 have happened or what the witness might have
6 said, had I permitted the witness to answer.
7 You should not draw any inferences from the
8 question itself. You need both a question and
9 answer for your consideration.

10 During the trial it may be necessary for
11 me to confer with the attorneys out of your
12 hearing, talking about matters of law and other
13 matters that require consideration by me alone.
14 It is impossible for me to predict when such a
15 conference may be required or how long it may
16 last. When such conferences do occur, they
17 will be conducted as to consume as little of
18 your time as necessary for a fair and orderly
19 trial of the case.

20 During the trial we will take recesses.
21 During these recesses you should not discuss
22 the case among yourselves or with anyone else,
23 nor permit anyone to say anything to you or in
24 your presence about the case.

25 Further, you must not talk with the

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1 attorneys, the witnesses or any of the
2 parties, about anything until your
3 deliberations are finishe. In this way any
4 appearance of something improper can be
5 avoided.

6 If during a recess you see one of the
7 attorneys and he or she does not speak to you
8 or even seem to pay attention to you, please
9 understand that the attorney is not being
10 discourteous but is only avoiding the
11 appearance of any improper contact with you.

12 If anyone tries to say something to you or
13 in you or in your presence about this case,
14 tell that person that you are on the jury
15 trying this case and ask that person to stop.

16 If he or she keeps on, leave at once and
17 immediately report this matter to my bailiff or
18 my court deputy, who will immediately advise
19 me.

20 Frankly, I've heard of it happening, but
21 I've never seen it happening in 25 or 30 years
22 of trying cases or being a judge. But keep it
23 in the back of your mind.

24 At this time the attorneys for the parties
25 will have an opportunity to make their opening

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1 statements, in which they may explain to you
2 the issues in the case and give you a summary
3 that they expect the evidence will show.

4 Since the plaintiff has the burden of
5 proof, they get to go first. And both sides
6 have been given the same amount of time,
7 approximately an hour and a half to present
8 their opening statements for you.

9 With that, Mr. Hunter.

10 MR. HUNTER: May it please the Court,
11 counsel, members of the jury.

12 Good afternoon. As I'm sure you all can
13 imagine, this is a very, very important case to
14 all of us. But no one more than Marie Fontana.
15 I will be giving a presentation to you this
16 afternoon and then when I'm done, Mr. Gerson,
17 my co-counsel, will also give you a
18 presentation.

19 And what we will attempt to do is to
20 present to you what we believe the evidence
21 will show on Marie Fontana's exposure to
22 environmental tobacco smoke, secondhand smoke,
23 her 20 years plus of involuntary smoking that
24 she endured as a flight attendant for TWA.

25 Marie came to the United States as a young

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1 child. She was originally born in Haiti. She
2 came here when she was very young. Her mother
3 died shortly after she came here and she was
4 raised by her father.

5 In 1972, she took a position with TWA.

6 Marie, you will meet her, and I will try
7 to bring her in this week, you may meet her
8 early in the next week, but what I think you
9 will find from her is that she is an
10 extraordinary person. She speaks five
11 languages. She was a very productive member of
12 society. She's well liked by her friends. She
13 has friends that will come in here that have
14 known her for 20 years and 30 years and will
15 testify as to what she has -- is going through
16 now, and what she will be going through in the
17 future.

18 In connection with this, I'd like to make
19 the following points that I think the evidence
20 will show. Cigarette smoke is a poison. It
21 contains 4,000 ingredients, about 4,000
22 chemicals, it may contain more. It contains
23 such things as arsenic, hydrogen cyanide,
24 nicotine, ammonia. It has carcinogenic
25 elements in it that cause cancer in humans and

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1 animals. And it has been demonstrated and it
2 has been shown that direct smoking causes
3 disease and death and environmental tobacco
4 smoke causes -- and as the Judge has instructed
5 you to presume, and I'm repeating from the
6 Judge's instruction, this is deathly important:
7 I instruct you that there is a rebuttable
8 presumption that exposure to secondhand smoke
9 or environmental tobacco smoke is harmful to
10 one's health and can cause chronic bronchitis,
11 emphysema, chronic sinusitis and chronic
12 obstructive pulmonary disease in healthy
13 nonsmokers.

14 Now, one of the most important pieces of
15 evidence that I will bring to you in this case
16 will concern the anatomy of the human body.

17 Follow me on this. Starting at our nose,
18 our nasal passages are filled with hairs, which
19 are designed to keep particles from going in
20 our nose.

21 Now, as you go through the nose and
22 through the hairs in your nose which are
23 designed to keep particulate matter out, the
24 nose then turns into different channels. It's
25 not just two round holes that go up and then

1 down the throat and into your lungs. They come
2 to have channels, which are sort of like the
3 baffles in the exhaust system of a car so that
4 the air now gets channelled, instead of just
5 down one path, it starts to get channelled
6 through different paths.

7 And the reason is is that each one of
8 these paths is lined by what's called the mucus
9 blanket. The mucus blanket is a sticky
10 substance like a fly trap. And the purpose of
11 that fly trap is so that if particles get
12 through the nose and get into the nasal
13 passages and into the sinuses and drawn down
14 towards the bronchus, these baffles are now
15 lined with the fly trap and the particles get
16 stuck.

17 Now, if a particle goes past the fly trap
18 and gets into the actual respiratory tract and
19 starts to go down into your precious lungs,
20 then each one of those tubes, every single tube
21 that takes air into your lungs, is lined with
22 little hairlike creatures, I mean little
23 hairlike structures. And they beat in uniform
24 like little soldiers passing a ball up and out
25 again, so that if you get a particle that goes

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1 into your lung, then these little structures
2 called cilia are trying to send everything back
3 out.

4 And the cilia are the last line of defense
5 to keep things like environmental tobacco
6 smoke, secondhand smoke, poison from getting
7 into the deep part of your lungs. And after 20
8 years of heavy exposure to this, and I'm
9 talking transAtlantic flights, ten hours,
10 seven-hour flights on a 747 -- at one point in
11 time there were 240 smoking seats. So you have
12 an airplane, which is essentially a hollow
13 aluminum tube with hundreds of people smoking,
14 and Marie Fontana working in that environment
15 to do her job as a flight attendant. When she
16 started, she started so long ago that the
17 actual term in the manual of TWA people called
18 them stewardesses. And it's a term that, it's
19 been so long since anybody used "stewardesses,"
20 it's now, the socially appropriate term is
21 "flight attendant." That's how long she was in
22 this environment.

23 And she will testify, and other people
24 will testify, that when she would get on the
25 plane, she would begin to cough, she would have

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1 all of the symptoms that everyone has when
2 they're exposed to high doses of involuntary
3 smoke, secondhand smoke. And she would cough
4 throughout the trip. She would cough when she
5 got home and it would be repeated and it would
6 be repeated, and it would be an occupational
7 exposure that she had for over 20 years.

8 And it's cumulative. And every time she
9 would get on that plane, the particulate matter
10 would go down her nose and past the hairs and
11 past the fly trap and past the lung tubes, the
12 airways of the lung.

13 One of the pieces of evidence you'll hear
14 in this case, which I truly find to be
15 fascinating, is as the airways go out --

16 Let me see if I can draw this.

17 Can everybody see this if I draw here?
18 I'm not an artist and I'm not an anatomical
19 drawing expert. But I'll give you an overview
20 of what the evidence will be.

21 You have two lungs and down comes the main
22 bronchus and it arches out into each lung. And
23 then each one of these tubes goes into other
24 tubes, just truly like the branches of a tree.

25 And you will see Dr. Foley, one of my

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1 first witnesses -- I hope to bring him for you
2 tomorrow morning -- will show you a true
3 anatomical drawing. And this is called a
4 bronchial tree, because truly it's like the
5 branches of a tree. And as the branches get
6 farther away from the main stem, they get
7 littler just like a tree. Truly, if you draw
8 this upside down, you could put leaves on it,
9 it would look like a tree.

10 And as the tubes get smaller and smaller,
11 as they reach the periphery of the lung, they
12 terminate into microscopic, very, very tiny
13 things, which allow for the exchange of oxygen.
14 Oxygen goes through the -- they become the --
15 the walls get so thin that it's really like
16 literally the width of a cell.

17 So oxygen now transfers through, from the
18 air through the cell wall, into the blood and
19 then back out, becomes carbon dioxide. That's
20 called the gas exchange.

21 But if you were to take the surface of
22 these airways -- and that's an important
23 term -- if you were to take the surface of
24 those airways and lay each one out in the
25 entire lung of a normal person, it would be the

1 size of a tennis court. And that's how much
2 surface area you have to facilitate the
3 exchange of oxygen coming into the lung and
4 then CO₂, which is the byproduct coming out.

5 Now, in about the middle part of her
6 career, Marie, they think, started to develop a
7 condition called sarcoidosis. Now, sarcoidosis
8 is not a disease of these airways. See, smoke,
9 tobacco smoke, causes disease of these airways,
10 because it's a constant irritation. It's an
11 inflammation, constantly.

12 Now, some people, for reasons that science
13 doesn't know, can smoke three packs a day for
14 25 years and never develop emphysema or cancer.
15 And the medical community doesn't know why some
16 people can smoke and never get anything and yet
17 other people who smoke the same die of cancer
18 at 35 or 40 years of age. And nobody
19 understands why some people are so -- it's so
20 harmful to them to be exposed to environmental
21 tobacco smoke.

22 But remember again, in this case, as the
23 Judge has instructed you, in fact, the question
24 of fault is not for your consideration in this
25 case. I'm not faulting the tobacco companies

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1 as I stand here before you. I'm just saying
2 the issue is: Was Marie Fontana, an individual
3 special human being, was her exposure for 20
4 years on these long transAtlantic flights did
5 it cause her an injury, and if so, what are her
6 damages?

7 And I submit to you that the evidence will
8 be that it did, it damaged her airways. It
9 started, as I said, in the nose, she's had
10 sinus problems, she had sinus problems so long,
11 constantly had a post-nasal drip, constantly
12 had clearing her nose, headaches above the
13 eyes. You know how everybody has had sinus
14 before. She had that chronically until one
15 point in time, we think it was in 1990,
16 although these records we've never been able to
17 get our hands on -- we've got medical records
18 of Marie that go back a long way -- she finally
19 had her sinuses operated on because of a
20 chronic condition in her sinuses.

21 MR. REILLY: Objection, Your Honor, may we
22 approach?

23 THE COURT: Briefly.

24 (The following proceedings were had at
25 sidebar:)

1 MR. REILLY: This is what this motion for
2 summary judgment was for. Mr. Hunter just made
3 reference to medical records we don't have,
4 can't have, none of us have. He's just made
5 reference to documents that will never be in
6 evidence in this case. I object to that.

7 He's given this jury the impression that
8 the medical records exist, that we don't have
9 to say what he just said. That is false, we've
10 never seen any such records.

11 His client testified in her deposition
12 that she had such surgery, but there has never
13 been one doctor come forward to say it. There
14 has never been a doctor who diagnosed her with
15 such condition or said that he operated on such
16 a condition.

17 So Mr. Hunter has just represented to this
18 jury facts that will never be in evidence in
19 this case.

20 THE COURT: I take it that she is going to
21 testify that she had this operation?

22 MR. REILLY: She's going to say she had
23 surgery, but she can't tell you what the nature
24 of her surgery was because that would be a
25 medical opinion.

1 THE COURT: If I bust a leg or something
2 like that and I have it set by somebody, I
3 can't tell somebody I had a broken bone?

4 MR. REILLY: Your Honor, what she said in
5 her deposition was that she had surgery on her
6 nose to correct a deviated septum, not because
7 she had sinusitis. She can't tell us she had
8 sinusitis because that's a medical opinion that
9 lay people aren't allowed to give.

10 THE COURT: I'm not sure I buy that all
11 together.

12 MR. REILLY: In addition to that Mr.
13 Hunter just indicated that there are medical
14 records, implying that there are medical
15 records that exist that would tell this tale,
16 but in fact there are none, can't be any, never
17 been produced, no such hospital has ever been
18 located. There is no evidence in this case and
19 there won't be.

20 MR. HUNTER: We know where she had the
21 surgery. She had the surgery at the Cleveland
22 Clinic, and they told us that their retention
23 policy is after 10 years, and nobody served a
24 subpoena on them.

25 MR. ENGRAM: The Cleveland Clinic has

1 never been identified as the place where she
2 had surgery.

3 THE COURT: Let's go on. The objection is
4 noted, and let's go on with the openings
5 statements.

6 (The sidebar conference was concluded, and
7 the following proceedings were held in open
8 court:)

9
10 (The record was read by the reporter.)

11 MR. HUNTER: She finally had her sinuses
12 operated on. You'll hear testimony from one of
13 her next-door neighbors, who looks after her,
14 concerning her attempts to go in for an
15 operation that would help her with her sinus
16 condition, and a friend.

17 But the records were destroyed and I
18 couldn't, I can't bring you a medical --

19 MR. REILLY: Same objection, Your Honor.

20 THE COURT: Same ruling.

21 MR. HUNTER: I can't bring you the medical
22 records because by the time we went to get the
23 records, under their retention policy, they had
24 been destroyed.

25 Now, there's a difference between airway

1 disease and sarcoidosis.

2 Sarcoidosis affects not the airways, but
3 the areas essentially around the airways. So
4 if my tree was, as I've indicated in yellow,
5 the sarcoidosis is -- it's an inflammatory
6 disease which causes like a calcification of
7 some of the tissue.

8 And it hurts the lungs' ability to draw in
9 air, it hurts the actual ability of the lung
10 capacity, the volumes of air.

11 And when you hurt -- when you have
12 sarcoidosis -- and I'm not contending in this
13 case that that condition was caused by the
14 defendants' tobacco smoke, because no one knows
15 what causes it, sarcoidosis. It usually is a
16 condition which resolves by itself. And it's
17 usually not life-threatening.

18 It's a disease which they truly don't know
19 what causes it. It is more commonly found in
20 women, African-American women, who seem to have
21 a higher incidence. No one knows why. But
22 that's just one of the things they're studying.

23 So I'm not contending, and I don't intend
24 to offer any evidence, I'm not asking you to
25 indicate in your verdict that the cause of this

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1 is something that we'll know at the end of this
2 case. But, if you sicken these airways and
3 inflame the airways and the bronchi, you'd have
4 peribronchial thickening, then one of the
5 airways diseases that you begin to have is
6 bronchitis.

7 And Dr. Foley, the radiologist, the first
8 radiologist, will tell you about what he sees
9 as, and show you in this lung -- and I don't
10 have his X-ray here with me, but I would show
11 when he gets up here, he'll show you the x-ray.
12 And he'll show you what he calls peribronchial
13 thickening, which is an indication, you can see
14 it on an X-ray, it's something that you can
15 look at, it's an objective piece of evidence to
16 indicate that bronchitis that she has.

17 She also has emphysema, which is apparent
18 on a CT scan of the chest which was done in
19 1996.

20 Now, you're going to hear a pretty
21 interesting story about this CT scan. And
22 you're going to hear from some pretty
23 interesting witnesses. One of the witnesses
24 that -- the Surgeon General first handed out
25 the definitive report on involuntary smoking in

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1 1986. And since 1986 until now, both the
2 medical community, all of the doctors that
3 study these things to try to protect people
4 from being exposed to something that before we
5 didn't know was bad, but as we gain medical
6 knowledge, we know can harm us, no matter how
7 innocent a bystander we are.

8 So the expert that I went to, I looked
9 around the country to find out who knows about
10 sarcoidosis. And it's an institution in
11 Denver, Colorado, known as the National Jewish
12 Center for Immunology. At the National Jewish
13 Center in Denver, Colorado are probably the
14 finest experts in the United States on the
15 issue of sarcoidosis.

16 One of the gentleman who was at the
17 National Jewish Center in Denver relocated to
18 the University of Vermont. He was a pulmonary
19 physiologist. He's a Ph.D. who studies the
20 physiology of the lung, meaning, what is the
21 biological structure of our lung, what are the
22 airways, what is the inside, what is the inside
23 of the airway made out of, how does it
24 communicate to the parenchyma of the lung, how
25 does the gas transfer take place?

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1 And he was an individual who you will see
2 here by the name of Charles Irvin.

3 Charles Irvin is probably, has probably
4 written books, chapters in books. He's written
5 150 medical articles, in periodicals that are
6 reviewed. He's one of the finest experts in
7 the country on the issue of the physiology of
8 the lung.

9 So I sent the CT scan and the medical
10 records to Dr. Irvin up at the University of
11 Vermont, where he's now located, as a director
12 of the pulmonary clinic. Although he's a
13 Ph.D., he's also a professor of medicine and
14 teaches doctors, he lectures to doctors and
15 travels around the United States lecturing.

16 And fortuitously, at the time when
17 Dr. Irvin was looking at the records, he put
18 the CT scan up on a shadow box, and strolling
19 through his office was a pulmonologist from
20 Denver by the name of Thomas Petty. And Thomas
21 Petty, everyone will acknowledge is --

22 MR. REILLY: Objection, Your Honor.

23 THE COURT: Overruled.

24 MR. HUNTER: Thomas Petty, the evidence
25 will show you, is a giant in his field, in

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1 pulmonology. And Dr. Irvin said: Dr. Petty,
2 look at this CT scan blind. I'm not going to
3 tell you anything about it, just look at it
4 blind.

5 When a radiologist says: Look at it
6 blind, meaning they don't have any background
7 behind it.

8 And he said: What do you see? And Dr.
9 Petty said: I see end stage sarcoidosis, which
10 means the sarcoidosis is to the extent where it
11 is in its end stage and may take her life.

12 But I see another disease process going on
13 here. I see airways disease, I see what's
14 called blebs, b-l-e-b-s, which are little holes
15 in the lining. And I think there's emphysema
16 superimposed on that sarcoidosis.

17 And as a result of that, the combination,
18 the aggravation of this by the environmental
19 tobacco smoke, something that Mr. Gerson will
20 get to a little closer, or in a little more
21 detail, it's the aggravation, and it's the
22 combination of these diseases, the airways
23 disease, the bronchitis and the emphysema that
24 is the reason that Marie right now is on a
25 waiting list for a lung transplant at Jackson

1 Memorial Hospital.

2 Now, one of the points that I'm going to
3 suggest to you that the evidence will show in
4 this case is that environmental tobacco smoke,
5 as it's called by the tobacco industry, or what
6 I call involuntary smoking, secondhand smoke,
7 in order to be regarded as a legal cause of
8 damages to someone in Florida, need not be the
9 only cause. And in this case the evidence will
10 show, as the law says under Florida law, and
11 Judge Wilson will tell you, it need not be the
12 only cause, it may be a legal cause if it acts
13 in combination with another cause.

14 MR. REILLY: Objection, Your Honor.

15 THE COURT: Overruled.

16 MR. HUNTER: The evidence in this case
17 will be that the sarcoidosis, which we don't
18 know the cause for, was one process, was one
19 thing Marie had to fight with; but with that
20 weakened lung in combination with the 20 years
21 exposure to the secondhand smoke brings her to
22 the point in time where she is, or the
23 condition that she's in today.

24 I'm going to say without any embarrassment
25 that I am going to be proud to present to you

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1 as a witness in this case the Surgeon General
2 of the United States of America. You will see
3 him testify in this case before you on a
4 television screen. I ask you to listen
5 carefully to his testimony.

6 I will also bring to you -- and listen to
7 the tobacco lawyers cross examine him, because
8 you're going to be asked to make your ruling on
9 the greater weight of the evidence in this
10 case. And I will bring you, in addition to the
11 Surgeon General of the United States of
12 America, David Burns, who either wrote or was
13 the scientific editor of every Surgeon
14 General's Report, or the chapter on involuntary
15 smoking.

16 And the tobacco lawyers will cross examine
17 him, but listen carefully to his testimony,
18 because both Dr. Julius Richmond, who was about
19 80 years old when he testified live in another
20 courtroom before another jury, and Dr. Burns
21 will tell you that exposure to secondhand smoke
22 in airline cabins causes respiratory illness in
23 flight attendants. And that as of 1997 when he
24 testified and even more so today, there is no
25 longer any medical controversy on this issue.

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1 Yet you will see the tobacco industry will
2 dispute that vigorously and cross examine him.

3 And listen carefully to both the direct
4 and the cross examination on that point. And
5 be guided at all times by your common sense in
6 this case, because there are medical issues
7 that are going to be presented to you, but
8 there are also going to be evidence of things
9 that your common sense will always keep you in
10 light about.

11 The evidence will be if direct smoking can
12 cause disease, obviously environmental tobacco
13 smoke, secondhand smoke causes disease.

14 MR. UPSHAW: Objection, Your Honor.

15 THE COURT: Overruled.

16 MR. HUNTER: Another witness that I will
17 call and present to you will be a pilot for
18 Eastern Airlines, who took photographs of the
19 outflow valve of the airplanes that he flew on
20 Eastern Airlines.

21 And you will see visually, and I can't
22 remember, as I'm seeing each one of you, who
23 flew in the days when smoke was on planes and
24 who didn't, but you will see a photograph taken
25 by a pilot who has no connection with this

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1 lawsuit of an outflow valve on an airplane back
2 in the days when smoking was allowed, which
3 shows a, just a huge trail, a smoke trail of
4 brown tobacco tar that comes out the outflow
5 valve.

6 I'm going to bring for you flight
7 attendants who, when I say back in the old
8 days, because I'm trying to recreate for you
9 something that hasn't existed domestically in
10 domestic aircraft in 10 years and hasn't
11 existed in five years on international flights.
12 I'll bring in people who actually saw it,
13 people who smelled it, people who worked in it,
14 people who can tell you what it was really
15 like.

16 Dr. Burns was an unpaid witness. The
17 Surgeon General had never testified before in a
18 courtroom.

19 I will also bring Dr. Hammond.
20 Dr. Hammond was a scientist -- and her name is
21 Katherine -- was a scientist on behalf of the
22 Occupational Safety and Health Administration
23 or the National Institute of Health or the
24 Environmental Protection Agency or, both, or
25 all, who is one of the only people without an

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1 ax to grind, without being hired by the tobacco
2 companies or anybody else, actually studied
3 flight attendants in -- or actually studied
4 secondhand smoke on flight attendants.

5 And she will testify that a five-hour
6 flight is equal to a half a pack of cigarettes,
7 in terms of cigarette equivalents for a flight
8 attendant, who -- and you'll hear testimony
9 about a flight attendant is much more active
10 than the passengers, because she's running up
11 and down the aisle, she's bringing meals to
12 people, she's working, she's bending over. And
13 her respirations rate has increased as someone
14 who is doing some level of activity; that every
15 five hours in the plane, that's about
16 equivalent, in cigarette equivalents, to her
17 smoking a half a pack of cigarettes.

18 And according to Marie Fontana's flight
19 time for 20 years, these long transAtlantic
20 flights, with a lot of -- depending on the
21 season, would have, sometimes she would be down
22 in South America, sometimes she would be in
23 North Africa, sometimes she would be in Europe.
24 But depending on the season you either have
25 people coming to the United States because it

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1 was their vacation or you had people from the
2 United States going to the far away
3 destinations because of their vacations or
4 travel plans.

5 But these were always full flights because
6 transAtlantic flights are usually full, and
7 they had a high volume of people who smoked on
8 the plane. So this is a high exposure to this.
9 And probably it's higher than that.

10 But if we figure out her flight time as
11 best as we can, and I'm sure the tobacco
12 companies will dispute this, but if we figure
13 out in cigarette equivalents, it's between
14 38,000 to 40, over 40,000 cigarettes that she
15 was -- would have smoked to get this type of
16 exposure, based on her 20 years experience on
17 these long smoking flights.

18 Now, the defendants will of course present
19 their witnesses. And one of the things that
20 one of the defenses will be that, by paid
21 experts that they've hired, they hired one
22 expert to make a video of an airplane to show
23 the way the air circulates inside and paid
24 \$250,000 --

25 MR. GERAGHTY: Objection, Your Honor.

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1 THE COURT: Overruled.

2 MR. HUNTER: -- to try to impress on you
3 the position that these planes were highly
4 ventilated. There was a very efficient system,
5 and therefore there really couldn't have been
6 too much smoke in there, because they have an
7 air exchange every five or six minutes, and
8 there used to be fresh airplanes.

9 And I ask you to listen carefully to their
10 experts, their retained experts that they've
11 paid this money to, and weigh it against the
12 people who were there, to see what you feel in
13 your good, common sense the exposures really
14 were.

15 The evidence will be that they have hired
16 a gentleman, who is well qualified, who will
17 testify to you -- and I have to address, I feel
18 it's my obligation to suggest to you what all
19 the evidence is, not just mine -- a very well
20 qualified doctor, very good qualifications, who
21 says that, despite the Surgeon General and the
22 National Institute of Health and the
23 National -- or the American Cancer Society and
24 everybody else, it hasn't been proven yet that
25 environmental tobacco smoke causes disease in

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1 healthy nonsmokers. He doesn't say it doesn't.
2 He just said, well, it hasn't been proven yet.

3 And when you hear that testimony, remember
4 also that you are listening to it with the
5 presumption or with the rebuttable presumption
6 that it does, as instructed by Judge Wilson.

7 Now, at the risk of stating the obvious to
8 you, as though the witnesses that you will see
9 in this case, I will bring to you, the Surgeon
10 General, Dr. Charles Irvin, Thomas Petty, Dr.
11 Foley, I'm going to show you the X-rays. In
12 addition, I ask you to also consider that the
13 evidence will also be that smoking is banned
14 finally on airplanes. Smoking is banned in
15 this courtroom, this courthouse, in hospitals;
16 it's banned all across the United States in
17 places where it can affect the health of
18 people, especially people that are predisposed
19 or have another illness, another lung disease.

20 So listen as you hear the evidence, listen
21 carefully to the tobacco attorneys when they
22 give their presentation, listen carefully to
23 them, give them your full attention. But keep
24 your common sense next to you as you hear all
25 the evidence in the case. And then I'll have

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1 an opportunity once again to speak directly to
2 you in my closing remarks at the end of the
3 case.

4 Thank you.

5 MR. GERSON: May it please the Court,
6 ladies and gentlemen of the jury. Despite all
7 the fuss, what it really will come down to is
8 just a basic common sense judgment on your part
9 of what makes sense. So you're going to hear
10 some pretty highly qualified doctors and other
11 experts testify in the trial. Don't let any of
12 that intimidate you, don't let go of your own
13 common sense and good judgment, because those
14 are the things that are going to lead you to
15 the right outcome for this case.

16 Now, as you already know, there's two
17 issues: Legal causation and damages. And so
18 we will be asking you to agree that involuntary
19 tobacco smoke was a competent producing cause
20 of disease in our client, and we will ask you
21 to say how she has been damaged in dollars and
22 cents.

23 To answer these questions, you will have
24 to value the loss of someone's loss of
25 enjoyment of life, the pain and suffering and

1 anguish of the deterioration of health and life
2 itself, and the value of the loss of her life.

3 And this will be an awesome
4 responsibility. It will be a challenge unlike
5 any that you have ever faced in your lives
6 before.

7 MR. UPSHAW: Objection, argumentative.

8 THE COURT: Sustained. Move on.

9 MR. GERSON: There will be no other
10 opportunity for justice for my client, your
11 verdict in this case will have to measure the
12 life.

13 MR. UPSHAW: Objection, argumentative.

14 THE COURT: Sustained. Let's move on.

15 MR. GERSON: At the end of the trial I'll
16 have another opportunity to address you in the
17 closing argument, and I'll try and help you
18 reason through the evidence that's been
19 presented during the trial and arrive at a fair
20 and just amount of damages for my client.

21 Now, it's normal to expect evidence of
22 fault. But as you already know, none will be
23 presented in this case, there will be no
24 evidence of fault by the defendants, there will
25 be no evidence of fault by the plaintiff and

1 there will be no evidence of fault by the
2 airline that she worked for or by anyone else.

3 I tell you this now because it is only
4 human to wonder or to speculate about who was
5 at fault. And I'm explaining this to you so
6 that you understand what your role as jurors in
7 the trial will be.

8 So now that I've explained what you won't
9 be asked to decide, let me go back and talk
10 with you for a few moments about what you will
11 be asked to decide.

12 The first issue will be whether
13 involuntary smoke was a legal cause of her
14 condition. Now, I say legal cause because as
15 you've already been told, it need not be the
16 only cause. It will be enough if you find that
17 the involuntary smoke acted in combination with
18 other causes, so long as it can be said that
19 but for the involuntary tobacco smoke, Marie
20 Fontana's condition would not exist as it does
21 today.

22 To put it another way, if the secondhand
23 smoke aggravated, that is to say, made it
24 worse, or if the secondhand smoke accelerated
25 that, is to say, made it progress faster, or

1 both, then Marie would be entitled to recover
2 damages from the four tobacco companies who are
3 the defendants.

4 Now, these four companies are the
5 defendants in the trial because between them
6 they manufactured and sold the majority of
7 popular brands of American cigarettes that were
8 sold on the flights that Marie Fontana worked
9 on.

10 MR. UPSHAW: Your Honor, objection, may we
11 be seen at sidebar on this issue?

12 THE COURT: No, sir, overruled.

13 MR. GERSON: Let me get back to the
14 causation issue.

15 Like I said, it's enough to aggravate or
16 accellerate or act in combination with other
17 diseases. I'm telling you this so you
18 understand what we will be proving with our
19 evidence and what we will not be required to
20 prove.

21 So we will not prove that secondhand
22 tobacco smoke, to the exclusion of all other
23 factors, was involved. We will only prove that
24 the secondhand or involuntary tobacco smoke was
25 a legal cause of the injuries and damages that

1 she has.

2 You will be asked to apportion between the
3 two which was caused by involuntary tobacco
4 smoke and which was not.

5 Now, I already know what the evidence is
6 because I've been to the depositions or read
7 the depositions of all of the witnesses who are
8 going to testify.

9 MR. REILLY: Objection, Your Honor.

10 THE COURT: Overruled.

11 MR. GERSON: And we know that you will be
12 unable to make the apportionment. And under
13 the law you will be asked to --

14 MR. REILLY: Objection, Your Honor.

15 THE COURT: Overruled.

16 MR. GERSON: And under the law, you will
17 be asked to allow for the entire condition in
18 your verdict, if you are unable to make the
19 apportionment.

20 Now, we will ask you not to feel sorry for
21 the tobacco companies if you can't make this
22 separation in the damages, because your job is
23 simply to follow the law, based on the
24 evidence, apply the law that the Judge gives
25 you, and to be faithful to the oath that you

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1 took earlier this morning.

2 You already know that Marie Fontana has a
3 condition known as sarcoidosis. And we've told
4 you that we cannot prove that sarcoidosis is
5 caused by smoke just as the tobacco companies
6 cannot prove that it is not.

7 Marie Fontana's sarcoidosis was diagnosed
8 in the late '80s. This was recognized. And
9 then after that, no one else looked any further
10 to determine if there was something else
11 involved.

12 At the time of the original diagnosis,
13 nothing was known about the harmful effects of
14 secondhand tobacco smoke. And so the questions
15 of whether secondhand tobacco smoke played any
16 role at all in the extensive and prolonged
17 exposure that Marie Fontana had, which led to
18 the diagnosis ultimately of a sarcoidosis, was
19 never asked.

20 No one asked those questions. But as
21 years went by, more and more became known about
22 secondhand tobacco smoke. We learned about the
23 harmful effects of secondhand tobacco smoke on
24 human health. And it's only just recently that
25 the tobacco companies in this trial finally

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1 stopped denying that direct tobacco smoke
2 caused pulmonary illness and disease.

3 Now, armed with the knowledge that direct
4 tobacco smoke can and does cause respiratory
5 disease, we will prove in this trial that
6 secondhand smoke causes the very same diseases,
7 too.

8 So we had experts, some of whom Steve has
9 talked with you about already, look at Marie
10 Fontana's medical records and at her X-rays.
11 And what they will tell you in this trial is
12 that Marie has more than just sarcoidosis.
13 They will say that she has chronic obstructive
14 airway disease, or COPD, which is sort of a
15 category rather than a particular disease, and
16 one that includes bronchitis and includes
17 emphysema.

18 The defendants will say that Marie's
19 doctors did not make this diagnosis according
20 to their records. And they're right. But the
21 fact is the truth is that Marie's doctor never
22 found it because he never looked for it.

23 Better trained experts who will testify in
24 this trial will show you that it was there all
25 along in the data that was recorded in the

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1 records and in the X-ray films. You will see
2 it with your own eyes and you will hear it
3 explained by these preeminent doctors during
4 their testimony in the trial.

5 Now, let me say that pulmonary and
6 respiratory medicine is complex. But I think I
7 can make it very simple and break it down to
8 its most basic terms. Sarcoidosis is a
9 condition that causes scarring in the lungs, as
10 Steve just explained, which interferes with a
11 person's ability to breathe in air and have the
12 gas exchange of oxygen for carbon dioxide take
13 place.

14 COPD is a condition that interferes with a
15 person's ability to breathe out air and
16 exchange carbon dioxide for oxygen.

17 In Marie Fontana's case, no one can prove
18 what caused the sarcoidosis or the breathing in
19 problem. But we can prove and we will prove
20 that involuntary cigarette smoking caused the
21 COPD or the breathing out problem.

22 Highly qualified doctors who will testify
23 in the trial will say that without the COPD,
24 Marie's sarcoidosis would not threaten her
25 life. They will say that without sarcoidosis,

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1 Marie's COPD would not threaten her life. But
2 the combination of the two diseases means that
3 Marie Fontana will not get better.

4 Marie Fontana has a death sentence. Her
5 condition is terminal. It will take her life.
6 With a double lung transplant, if she can get
7 it, she may get a stay of execution of five,
8 maybe even ten years. But even the defendants
9 and all of their doctors will agree that the
10 outcome for Marie is not in doubt. Our client
11 will die from the deadly combination of these
12 diseases. And but for the tobacco smoke, she
13 would have lived out a normal life.

14 Now, as you've already been told, our
15 client is not here in court. That is not
16 because she doesn't want to be here, it's
17 because she is too sick to be here.

18 Marie's breathing problems are so severe
19 that she needs oxygen from a tank pumped in
20 through her nose just in order to survive. The
21 tank is cumbersome and it has a limited supply
22 of oxygen, without which she cannot manage.

23 If your car runs out of gas, your car will
24 stall until you put more gas in the tank; but
25 if the oxygen tank that keeps Marie Fontana

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1 alive runs out, she will choke to death.
2 Because of this, she is totally disabled and
3 she cannot work or enjoy her life like a normal
4 person.

5 Nevertheless, you will get to meet her
6 during the trial. She will appear briefly, and
7 we will ask the Judge for permission to let her
8 testify for short periods, with rest time in
9 between, so that you will get to see for
10 yourself, firsthand, what she is like. And you
11 will get to understand her struggle.

12 Now, part of my job, as we break down the
13 labor between the lawyers in this case, will be
14 to help you understand how the poison of the
15 secondhand smoke has affected Marie's life.

16 As Steve said, Marie has many friends.
17 Some of them are flight attendants, and we will
18 call some of them to testify during the trial
19 over the next few weeks. We will not call them
20 merely because they were friends, but we will
21 call them because they are people who have had
22 an opportunity to know Marie both before this
23 happened and afterwards.

24 So this before and after analysis will be
25 much of what the trial is about: What she has

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1 lost, how she has been harmed and what the
2 future holds for her because of this illness,
3 will be some of the questions that we will ask
4 you at the end of the trial.

5 The evidence will show that there are tens
6 of thousands of dollars of medical expenses
7 which, if she gets the transplant, will become
8 hundreds of thousands of medical expenses when
9 all the future costs are added up. And that's
10 just the past and future doctor bills and
11 hospital bills.

12 Another issue will be how Marie's earnings
13 in the past and her ability to earn money in
14 the future has been affected.

15 The evidence will be undisputed that she
16 has not worked since December of 1996, that she
17 was forced to give up a job she liked enough to
18 spend her whole life doing it.

19 Marie has lost and will continue to lose
20 not only income, but the benefits from the very
21 good job she had because of the poison and
22 smoke.

23 Since there is no evidence from the
24 defendants that will controvert any of these
25 points in the case, we will not even bother to

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1 call an economist or other kind of expert to
2 testify. Instead we will rely on Marie to
3 explain what she had in her job and what she
4 has lost forever.

5 Now, thank goodness none of you has ever
6 had to face organ transplant.

7 MR. REILLY: Objection.

8 THE COURT: Sustained.

9 MR. GERSON: So this trial will be a
10 learning process for you about this cutting
11 edge and hopefully life prolonging procedure.

12 You will learn that there are four stages
13 to the transplantation process. The first is
14 evaluation. Marie has completed this part, and
15 she will tell you about the lengthy
16 comprehensive and exhaustive screening,
17 testing, examination and counseling that she's
18 had to go through.

19 The second phase is waiting. She's been
20 waiting since the fall for this life saving
21 help that may or may not come in time. She
22 wears a beeper so that if a suitable donor is
23 found, she can be notified to go to the
24 hospital at once. So far the beeper hasn't
25 gone off. She has no control over whether or

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1 not it will summon her before it's too late.

2 The third stage is the surgery itself, a
3 major surgical procedure where her sarcoid and
4 smoke contaminated lungs will be removed and
5 discarded in favor of unpoisoned healthy lungs
6 from a donor.

7 And the fourth stage is the long-term
8 care. You will learn how a transplant
9 recipient must take medications that work to
10 suppress the body's natural system from
11 rejecting the transplanted lungs.
12 Unfortunately, these medications have many side
13 effects, such as high blood pressure and
14 diabetes.

15 A transplant recipient is also at greater
16 risk for infections and cancers. All of this
17 places extraordinary demands on the lifestyle
18 of a transplant recipient. There are frequent
19 tests to make sure the transplanted lungs are
20 functioning well.

21 And you will learn that it is a lifetime
22 process, its many complicated and invasive
23 components cannot ever be discontinued once
24 they're started.

25 If the alternative were not the severest

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1 imaginable sanction, the loss of a life, Marie
2 would never consider such a drastic
3 undertaking. Her fear and anxiety over facing
4 this option, which has been forced upon her
5 through no fault of her own, will be talked
6 about later in the trial, when we discuss the
7 amount of her damages.

8 As I've said, the evidence in the case
9 will at times seem complicated, but in the
10 final analysis it will be something for you to
11 decide based on your own common sense and
12 experience.

13 Why did she have to be made sick when she
14 was just doing her job? What verdict would
15 equal justice for what Marie Fontana --

16 MR. REILLY: Objection, Your Honor.

17 MR. GERSON: -- has lost --

18 THE COURT: Sustained.

19 MR. GERSON: -- that is the ultimate
20 question we will ask you at the conclusion of
21 the trial.

22 THE COURT: Ladies and gentlemen, I think
23 it's appropriate to take about a five- or
24 ten-minute recess. Then we'll hear the defense
25 opening statements.

1 So I'll let you just leave your note pads
2 on your chair and come back up here in ten
3 minutes.

4 (The jurors exited the courtroom.)

5 MR. REILLY: Your Honor, I'd like to move
6 for a mistrial at this time on four bases.

7 First is this mention of the sinus
8 surgery. There is no evidence, there will be
9 no good faith statement.

10 The second is the false burden of proof
11 that Mr. Gerson represented, that we can't
12 prove that sarcoidosis wasn't caused by
13 environmental tobacco smoke. We never have
14 had, never will have such a burden of proof.

15 The third was the statement by Mr. Hunter
16 that there will be evidence in this case that
17 someone was paid \$250,000 to prepare a video.
18 There will be no such evidence like that in
19 this case.

20 The witness lists have been established.
21 There is no one on any witness list to make
22 such a statement.

23 And finally -- and Mr. Hunter knows that.
24 And finally, and the most grievous of them all,
25 was Mr. Gerson's reference just a moment ago to

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1 ask them to put themselves in the place of
2 someone who is going to have a lung transplant.

3 You sustained the objection. I now move
4 for a mistrial.

5 THE COURT: I'm going to deny it.

6 MR. HUNTER: Judge, when you get back, can
7 I take up an issue with you?

8 THE COURT: I'm going to recess.

9 (Judge Wilson exited the courtroom.)

10 MR. McCARRON: On Thursday we're going to
11 call Dr. Irvin. And we're going to be using
12 Ms. Fontana's medical records and X-rays and CT
13 scans. We're also going to be just calling
14 Carolyn Hurley, who is a flight attendant. The
15 only thing we'll be using with her are the
16 flight attendants', or the airplane seats and
17 any of the paraphernalia that goes along with
18 that, in the sense of the trays and forks and
19 plates and stuff like that.

20 And then the videos, we're putting
21 Hammond, Dr. Burns and Dr. Richmond. And the
22 only thing we'll probably be moving in the
23 Surgeon General Reports with either Dr. Burns
24 or Dr. Richmond.

25 MR. GERAGHTY: Which Surgeon General

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1 Reports?

2 MR. McCARRON: Whatever we have over
3 there, definitely 1986, probably 1979, but any
4 ones that they've mentioned in their testimony.

5 I know that Dr. Richmond discusses the
6 1964.

7 MR. ENGRAM: The ones that are over here
8 are '86, '89, '64, '79.

9 MR. McCARRON: Those are the only ones.
10 (A recess was taken.)

11 MR. HUNTER: Judge, one issue on the time
12 line. I didn't understand why it was on here
13 that she worked for Andy's Realty for three
14 months and that she attended the Gold Coast
15 School of Real Estate. Someone in the audience
16 that's smarter than I am, said: That might
17 give them the argument that she could have
18 taken another job.

19 MR. REILLY: Stop. I'm not going to make
20 the argument.

21 THE COURT: Mr. Hunter, hold on, stop.
22 I'm going allow the use of the time line.

23 MR. ENGRAM: Your Honor, one other thing.
24 We had discussed with the Court the videotape
25 testimony and the ability to review the

1 videotapes to insure that the portions had been
2 redacted that the Court ordered be redacted or
3 had ruled on. And we've not yet been able to
4 obtain a copy of the edited videotape from Mr.
5 Hunter. And he plans to play them tomorrow.

6 MR. HUNTER: Judge, I told him I'd give
7 him plenty of advance notice. We had it
8 digitalized so that the engineers can -- I
9 don't know, it's different than just a tape.
10 They digitalize the whole transcript and then
11 coordinate that with the film. And Mr.
12 McCarron's job is to make sure that everything
13 that we ruled on is on the digital version.
14 And we will give that to them well in advance
15 for them to review it and object or correct
16 anything that we did improperly. And we've
17 been working on that from the moment you ruled
18 on it, had to put the transcript into this
19 digital computer so that they can do the edits.

20 THE COURT: You'll get it as soon as
21 possible.

22 Are we all ready to go?

23 MR. REILLY: Judge, are you going to --

24 THE COURT: I'll give you the full hour
25 and thirty minutes.

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1 MR. REILLY: I want to know if you're
2 going to hold them until 5:30.

3 THE COURT: Yes. We're going to do it all
4 at one time.

5 (The jurors entered the courtroom.)

6 THE COURT: Make yourself comfortable.
7 Let the record reflect that all the jurors are
8 present.

9 Ladies and gentlemen, the defense is going
10 to give you their opening statement. It's
11 again an hour and a half. It will be right
12 around 5:20 by the time you get to go, and I
13 apologize for that. Usually it will be around
14 5:00, maybe a minute or two before or after.

15 MR. ENGRAM: Your Honor, may I proceed?

16 THE COURT: Yes.

17 MR. ENGRAM: May it please the Court.
18 Counsel. Ladies and gentlemen of the jury.

19 My name is Jonathan Engram. We met
20 yesterday. And I want to talk with you about
21 the issues that you'll have to decide in this
22 case. But I need to get my Magic Marker.

23 I'd like to start off, though, talking
24 about what the case is not about. We spent a
25 lot of time yesterday asking you questions in

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1 voir dire about your experiences and your
2 feelings and your beliefs, things about
3 cigarettes and environmental tobacco smoke that
4 you know and beliefs that you held.

5 But many of the things we talked about in
6 voir dire are not going to be issues in this
7 case. This case is not about whether cigarette
8 smoking causes disease. This case is not about
9 lung cancer, it's not about addiction, it's not
10 about whether cigarettes should be outlawed.
11 It's not about whether you have to like or
12 dislike tobacco companies. And it's not about
13 whether people should be permitted to smoke in
14 offices or in courthouses or in restaurants or
15 in your own home.

16 What the plaintiff has in this case is the
17 burden of proof to prove, by a greater weight
18 of the evidence, three issues. And I want to
19 spend some time talking with you about these
20 first two issues. But the issues that the
21 plaintiff has to prove -- and I've got to try
22 to set this up where it doesn't block everybody
23 and doesn't -- so I can see it.

24 But the issues in this case that the
25 plaintiff has to prove -- and this comes not

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1 from me, but from the Judge -- the Judge said,
2 first, the plaintiff has to prove to you what
3 lung disease she has.

4 And the second thing that she has to prove
5 to you is that environmental tobacco smoke was
6 the specific cause of that lung disease. And
7 I'm going to shorten here. But when I talk
8 about environmental tobacco smoke, I'm talking
9 about ETS. Everybody with me on that?
10 Environmental tobacco smoke was the specific
11 cause of her lung disease.

12 Now, another way you can look at specific
13 cause, ladies and gentlemen, is to think of it
14 as cause in fact, did environmental tobacco
15 smoke in fact cause that lung disease? And
16 that is the plaintiff's burden of proof in this
17 case.

18 And so when you review the evidence, when
19 you listen to the evidence at this trial, keep
20 in mind these two questions, and try to answer
21 these two questions when you hear the testimony
22 and review the exhibits that get introduced.

23 The third issue that the Court talked
24 about, and you decide this only if you find
25 that the plaintiff has a lung disease that was

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1 in fact caused by exposure to environmental
2 tobacco smoke, you would then decide what
3 Mr. Gerson was talking about, the issue of
4 damages.

5 So, let's see, what do you base your
6 decision on? They want you to base your
7 decision on common sense. But ladies and
8 gentlemen, the Judge is going to tell you that
9 you base your decision on the evidence
10 presented to you in this courtroom, the
11 evidence presented to you from this witness
12 stand, or from videotape testimony of
13 witnesses, or from deposition testimony of
14 witnesses that is read to you in court.

15 The other aspect of the evidence that you
16 will decide these two issues on are written
17 exhibits and documents introduced into evidence
18 and taken back with you into the courtroom.

19 You will not make your decision on these
20 two issues: What lung diseases does she have,
21 were any of them caused by exposure to
22 environmental tobacco smoke? You will not make
23 those decisions based on anything you heard on
24 T.V., anything you read in the newspaper,
25 anything you heard on the radio, anything some

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1 doctor may have told you, anything some friend
2 may have told you, and anything, any emotion or
3 sympathy that you may feel for Ms. Fontana.

4 We all feel a great deal of sympathy and
5 emotion for Ms. Fontana. She has an advanced
6 stage of this disease that no one knows what
7 causes it. It's so serious that she's on a
8 list to receive a lung transplant.

9 But sarcoidosis, and this is undisputed,
10 the cause of sarcoidosis is unknown.
11 Ms. Fontana knows that, her lawyers know that.
12 Every doctor that will testify in this
13 courtroom will tell you that. And there's no
14 dispute about that fact. So your job as jurors
15 is to put aside any sympathy you might have for
16 Ms. Fontana and for her condition and decide
17 the issues in this case based on the evidence
18 that comes from the witness stand and the
19 documents that you review.

20 And that's just how our system of justice
21 works in this country.

22 Let me talk a little bit some of the
23 examples or exhibits or documentes that are
24 going to be introduced at this trial.

25 You're going to have to review a number of

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1 Ms. Fontana's medical records. And we also
2 have some records and charts that show what her
3 flight schedules were like for some of the
4 years that she flew. We have TWA flight logs
5 that will show how often she flew and where she
6 flew to. And we have them for the years 1993,
7 '94, '95 and the last year she flew, 1996.

8 Let's talk a little bit about these two
9 issues now.

10 The very first one: What lung disease
11 does Ms. Fontana have? You've heard the term
12 "sarcoidosis". I didn't know what sarcoidosis
13 was before I was involved in this case. And I
14 think through our questions yesterday none of
15 you had either.

16 But sarcoidosis is what doctors call a
17 systemic disease, which just means that it's a
18 body -- it's a disease that gets in your body
19 and spreads throughout your systems. It
20 spreads throughout your circulatory system,
21 your bloodstream, it spreads throughout your
22 respiratory system or your lungs. It spreads
23 through your lymphatic system. And so
24 sarcoidosis can involve more than one part of
25 your body. Sarcoidosis can involve your eyes,

1 it can involve your lungs, it can involve your
2 kidneys.

3 In the eyes, a person with sarcoidosis
4 gets a condition that you'll see and hear about
5 called uveitis, which is just an infection in
6 the eye caused by the sarcoidosis. The reason
7 you'll know that is that Ms. Fontana had that
8 condition as a result of her sarcoidosis.

9 In patients with sarcoidosis in their
10 kidneys, the calcium accumulates and they get
11 what are called kidney stones. And again,
12 Ms. Fontana had kidney stones as a result of
13 her sarcoidosis.

14 But let's look at how sarcoidosis affects
15 the lungs. Because the real culprit here in
16 this case is what sarcoidosis is doing to
17 Ms. Fontana's lungs.

18 Sarcoidosis in the lungs, and when you
19 look at the medical records you'll see two
20 different terms, you'll see scarring, or
21 fibrosis. Those two words mean the same thing.
22 Sarcoidosis causes fibrosis, which is a medical
23 term that doctors use for scarring.

24 And what happens when your lungs become
25 scarred because of the sarcoidosis is that it

1 restricts, and "restricts" is a key word in
2 this case, the scarring restricts the ability
3 of the lungs to work by reducing how much
4 capacity your lungs have.

5 If you think of it very simplistically,
6 restrictive lung disease means that you cannot
7 breathe in. An obstructive lung disease means
8 that your lungs have difficulty breathing out.

9 And we'll talk about some of these
10 obstructive lung diseases that the plaintiffs
11 now claim Ms. Fontana has in a moment. But I
12 want you to remember one very important thing
13 about sarcoidosis, and that is that the
14 scarring makes it a restrictive disease.

15 Now, there will be talk about Pulmonary
16 Function Tests. Pulmonary Function Tests are
17 complicated tests where you breath in a tube
18 and they measure how hard you can breath in and
19 how hard you can breath out. "Pulmonary" is
20 just the medical term for "lung". And when you
21 talk about a pulmonary doctor or a
22 pulmonologist, all he is is a doctor that
23 treats people with diseases of the lung.

24 And a doctor, a lung doctor, can tell from
25 Pulmonary Function Tests whether a patient has

1 restrictive lung disease or obstructive lung
2 disease.

3 Now, some of the other things that the
4 scarring causes is that a patient's lungs
5 bleed. And you will hear that Ms. Fontana had
6 an episode in late 1996, in early January 1997
7 with what doctors call hemoptysis. But
8 hemoptysis is simply coughing up or spitting up
9 blood. That's caused by the scarring in the
10 lungs.

11 You'll see that in December of 1996
12 Mrs. Fontana was hospitalized because she was
13 spitting up blood.

14 There are other things that the
15 sarcoidosis does. The sarcoidosis in
16 Ms. Fontana has developed a fungus. And this
17 fungus has been found in her lungs by her
18 doctors, and there are different types of
19 fungus, and you'll see in the medical records
20 fancy words like aspergilloma or mycotoma to
21 describe these funguses that are growing in her
22 lung. It's really called fungi, so if you hear
23 a doctor talk about fungi, that means two
24 funguses.

25 So let's review what some of the things

1 that happened as a result of the scarring and
2 sarcoidosis.

3 Some of the other things that you get is
4 short of breath. It's just like you ran up a
5 set of stairs and, you know, that kind of
6 feeling that you have when you get to the top
7 of the stairs, you're breathing quickly and you
8 really are trying to grab your breath.

9 Well, the scarring causes Ms. Fontana,
10 with activity, to become short of breath. The
11 scarring causes her to cough. I think that
12 you'll see, when she comes in and testifies
13 before you, that she sometimes gets a cough.
14 And she sometimes will get what they call
15 sputum production or phlegm. And that's just
16 when you, you cough so hard that you try to
17 bring up -- when you had a chest cold,
18 everybody has had a chest cold, I'm sure, when
19 you cough so hard, just trying to clear your
20 chest, clear your throat. That's what sputum
21 or phlegm is.

22 And those are some of the symptoms that
23 people get, that people get with sarcoidosis.

24 Ms. Fontana had all of these symptoms --
25 the blood, the coughing up the blood, the

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1 shortness of breath, the fungus, the kidney
2 stones, the eye infection, the sputum
3 production. All of these symptoms were
4 symptoms that were expected complications in a
5 patient with advanced sarcoidosis.

6 Now, the fact that the plaintiff has a
7 lung disease called sarcoidosis doesn't entitle
8 her automatically to recover money from any
9 defendant. The plaintiff has the burden of
10 proving that the lung disease that she has was
11 in fact caused by or aggravated by her exposure
12 to ETS on airplanes when she was working as a
13 flight attendant.

14 So what evidence will you hear from this
15 witness stand or read a document about what
16 causes sarcoidosis or what aggravates it or
17 worsens it? The cause of sarcoidosis is not
18 known. That is the evidence that you'll hear.

19 The evidence you will hear is that it's
20 not known what causes or aggravates or worsens
21 it. In fact, the plaintiff's own treating
22 doctor, Dr. Coopersmith, the lung doctor in
23 Boca Raton, when he first saw Ms. Fontana, he
24 told her, on the very first office visit in
25 April of 1995, there is no known cause to your

1 disease.

2 You know, sarcoidosis is somewhat rare,
3 but it's not something new. It's something
4 that's been around over a century. It's
5 something that doctors and scientists have
6 studied over 100 years. And the American
7 Thoracic Society -- "thoracic" is just another
8 medical term for your chest. But the American
9 Thoracic Society, one of the country's leading
10 organizations on chest and lung disease, has
11 published a statement on sarcoidosis. They've
12 also published standards with respect to COPD,
13 or chronic obstructive pulmonary disease. And
14 you will hear testimony in this trial from a
15 former president of the American Thoracic
16 Society, a Dr. Rowell and Ingram from Atlanta,
17 Georgia, from Emory University School Of
18 Medicine.

19 What's interesting about this statement on
20 sarcoidosis is that it's intended to tell
21 doctors the things we know. They have a chart
22 on the first page of this statement, and it
23 says: Here are the things we know about
24 sarcoidosis. And here are the things we don't
25 know.

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1 Well, right on that chart published by the
2 American Thoracic Society are three things,
3 there's more than three things, but three
4 things that are important in this case: One is
5 that we don't know what causes sarcoidosis;
6 number two, we don't know how it is the disease
7 progresses or becomes advanced in people;
8 basically, we don't know why it gets worse.
9 And there's no test to say who with sarcoidosis
10 is going to get a progressive or a worsening
11 form of the disease.

12 So we don't know. Doctors and scientists
13 in this country after 100 years don't know what
14 causes sarcoidosis, they don't know why it
15 progresses in certain, in people to get a
16 progressive form of the disease that get worse
17 with sarcoidosis. And there's no test that
18 they can do to tell you, when you first get it,
19 whether you're going to be one of those
20 unfortunate 20 to 15 percent of the people with
21 sarcoidosis that's going to get advanced or
22 worsened form of sarcoidosis.

23 Now, I said that there's another chart in
24 this, on this first page from the American
25 Thoracic Society that sets out the things we do

1 know about sarcoidosis. We do know what these
2 features and symptoms are, shortness of breath
3 and coughing and the funguses.

4 We do know that steroids are an effective
5 short term treatment, that Ms. Fontana has been
6 taking these steroids. But we don't know why
7 steroids don't work forever. And that's been
8 Ms. Fontana's problem.

9 And one of the other things that we do
10 know, that doctors have studied, whether
11 smokers or nonsmokers are more likely to get
12 sarcoidosis.

13 Now, think about this for a minute. If
14 active smoking, people who smoke cigarettes, if
15 active smoking causes sarcoidosis, then
16 wouldn't doctors expect to see sarcoidosis more
17 often in people who smoke? If that was your
18 theory, smoking causes sarcoidosis, then you'd
19 expect to see more smokers with sarcoidosis
20 than nonsmokers.

21 But the opposite is true. People who
22 smoke don't get sarcoidosis. They're less
23 likely to get sarcoidosis.

24 And this is not coming from me, ladies and
25 gentlemen. This is coming from the American

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1 Thoracic Society. Sarcoidosis occurs more
2 commonly in nonsmokers than in smokers.

3 Let's talk a minute about the different
4 kinds of experts who are going to testify in
5 this case. There are two kinds of doctors, we
6 have medical doctors and then we have this
7 other group of doctors called Ph.D.s.

8 Now, the shortened version of medical
9 doctor is simply M.D., the abbreviation for a
10 doctor of philosophy is Ph.D. And it's very
11 important, because we call both of these people
12 doctors, that you understand when a witness is
13 testifying whether they're an M.D. or a Ph.D.

14 Now, M.D.s are doctors who go to college
15 for four years, they go to medical school.
16 Depending on when they went, they either go for
17 three years or four years. They do a one-year
18 internship. They do three years of residency,
19 and pulmonologists do another two years of
20 study, which they call a fellowship, so that by
21 the time you go into private practice as a
22 pulmonologist, you've spent 14 years, after you
23 graduated from high school, studying to be a
24 doctor. 14 years.

25 Now, Ph.D.'s have also done a lot of

1 studying. They have gone four years to
2 college, they've been in a Master's degree
3 program for at least two years, again depending
4 on whether they're in chemistry or toxicology
5 or physiology. And then they would have two or
6 three more years in a doctoral program in their
7 specialty.

8 But we call both of them doctor. What's
9 important is that only medical doctors can
10 diagnose disease. Only medical doctors can
11 treat patients.

12 That's not to say that a doctor who is a
13 chemist doesn't have a lot of information that
14 will be helpful for you to understand in this
15 case, it's just that when you hear testimony
16 from a doctor who is not an M.D., understand
17 that that person can't diagnose disease and
18 can't treat patients with disease.

19 Now, let's look at some more of the
20 evidence in the case. I said before that a
21 doctor that treats patients with sarcoidosis is
22 a lung doctor or pulmonologist. And the
23 plaintiffs, because they cannot establish ETS
24 in fact caused her sarcoidosis, now claim that
25 somehow ETS aggravated or worsened her

1 sarcoidosis.

2 And what's the evidence going to be in
3 this case about any sort of worsening of the
4 sarcoidosis? Well, you'll hear the testimony
5 of plaintiff's own hired expert witness,
6 Dr. Christopher Breeden.

7 Dr. Christopher Breeden isn't a lung
8 doctor, he is a pulmonologist. He went through
9 those 14 years of extra training.

10 The other kind of doctor, there are two
11 kinds of -- there are two more kinds of doctors
12 in the case, two kinds of experts. One is
13 simply somebody who treated Ms. Fontana, but
14 these other experts are people who are hired or
15 retained by the plaintiff or by the defendant
16 who never saw Ms. Fontana.

17 Now, plaintiff has three such hired
18 experts in this case. They have Dr. Breeden
19 from Boca Raton, a lung doctor. They have Dr.
20 Foley from Tampa, and he's an X-ray doctor or
21 radiologist. And they have Dr. Irvin, who's a
22 scientist. He has a Ph.D., not an M.D. And
23 he's from Vermont.

24 When you listen to the testimony in this
25 case, I'd ask you to pay close attention to the

1 testimony of plaintiffs' own expert,
2 Dr. Christopher Breeden, the lung doctor, the
3 only expert lung doctor that they brought in to
4 this case, because Dr. Breeden will tell you
5 that environmental tobacco smoke did not cause
6 or aggravate or worsen Ms. Fontana's
7 sarcoidosis.

8 I don't know if I mentioned this earlier
9 when I talked about Dr. Ingram, the former
10 president of the American Thoracic Society from
11 Atlanta, but my last name is Engram, but my
12 name I start spelling it with an "E",
13 Dr. Ingram in Atlanta starts spelling his name
14 with an "I". So we're not related and I didn't
15 want you all to think that that might be the
16 case.

17 There are two lung doctors that
18 Ms. Fontana saw. And you'll have the medical
19 records from these two doctors. Now, they may
20 both testify, but I'm not convinced of that.

21 There's one doctor, Jonathan Green. And
22 he is -- he was her doctor, he was
23 Ms. Fontana's doctor from 1989 to 1995. And
24 then her second doctor, her current doctor, is
25 a doctor named Edward Coopersmith. And he has

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1 been her doctor from '95 to the present.

2 When you look, and while we have a lot of
3 medical records in the case, Ms. Fontana went
4 to this lung doctor in the six years from 1989
5 until 1995 six times.

6 Now, I don't say this because I want you
7 to think Ms. Fontana wasn't sick. There's no
8 dispute that Ms. Fontana had sarcoidosis. But
9 what I want you to pay attention to is on those
10 six visits, what was she complaining about and
11 did she ever complain about environmental
12 tobacco smoke exposure making her conditions
13 worse?

14 When you look at those six office visits
15 from Dr. Green from 1989 until 1995, you will
16 see no entry by Dr. Green that says
17 Ms. Fontana's exposure to ETS caused her
18 sarcoidosis to worsen.

19 From 1995 to the present, Ms. Fontana's
20 doctor is Dr. Coopersmith. And there's a date,
21 another date that you need to remember, and
22 that is December 1996, because in December 1996
23 Ms. Fontana stopped flying.

24 Now, I want you to go back and look at the
25 records of Dr. Coopersmith. For those two

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1 years in 1995 and 1996 when she was still
2 flying in 1995, she saw Dr. Coopersmith four
3 times. And in 1996 she went to his office only
4 three times, once in April and twice in
5 December.

6 And remember, it was in December of '96
7 that she got the bleeding and had to be
8 hospitalized.

9 But if you look at those records for
10 Dr. Coopersmith from 1995, those four times and
11 the three times in 1996, you'll see no entry by
12 Dr. Coopersmith that says Ms. Fontana's
13 exposure to environmental tobacco smoke in the
14 aircraft cabin in fact caused, aggravated,
15 exacerbated or worsened her sarcoidosis.

16 You know, when Ms. Fontana went to see
17 Dr. Coopersmith the first time, she did tell
18 him that she becomes more short of breath with
19 exertion on flights. And she said: Especially
20 if I'm in the smoking section. She also said
21 that: I get more short of breath at higher
22 altitudes -- when you're higher up in the air.

23 But there's no suggestion in the record
24 that this was anything other than a temporary
25 symptom. And there's no suggestion that it in

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1 any way ever aggravated her or worsened her
2 sarcoidosis.

3 Another thing you should look for in these
4 doctor records, Dr. Green and Dr. Coopersmith,
5 you'll find there's no entry, no suggestion
6 that she not work as a flight attendant.
7 Instead, this is what you'll see when you
8 review the records, September 11, 1995, she
9 gets somewhat more short of breath when she
10 flies to Denver, Colorado, the Mile High City,
11 or when the plane reaches 44,000 feet.
12 Otherwise she is doing well.

13 April 12, 1996, Dr. Coopersmith said:
14 She's able to work essentially with no
15 difficulty. And even as late as December 1996
16 Dr. Coopersmith said: The patient is able to
17 perform her duties as a stewardess on overseas
18 flights.

19 My point isn't that Ms. Fontana isn't
20 sick. My point is that exposure to ETS did not
21 make her sick.

22 Dr. Ingram retired this year from Emory
23 University School of Medicine. He had been a
24 lung doctor there from 1967 until 1973, and
25 then he went back to Emory in 1992 until his

1 retirement last year. In between, from '73 to
2 '89, Dr. Ingram was a professor of medicine at
3 Harvard Medical School in Boston,
4 Massachusetts, one of the best medical schools
5 in the country.

6 Now, Dr. Ingram has been the director of
7 the pulmonary division at Emory hospitals and
8 at Harvard's affiliated hospitals, he's been in
9 charge of the pulmonary units and doctors
10 there. He's trained doctors, and he still
11 trains them in his retirement. He trains
12 doctors who specialize in lung disease.

13 He has treated patients, thousands of
14 patients with lung disease, and he's treated
15 patients with sarcoidosis.

16 And as I said earlier, the same group that
17 published the statement on sarcoidosis, he was
18 president of in the mid '80s.

19 Dr. Ingram also writes the chapter in an
20 internal medicine textbook used in the majority
21 of medical schools in this country. It's
22 called Harrison's Principles of Internal
23 Medicine.

24 And do you know what he writes the chapter
25 on in that book? He writes the chapter on

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1 chronic bronchitis, emphysema and chronic
2 airway obstruction.

3 Remember, the diseases that Judge Wilson
4 told you about in your preliminary charge, you
5 need to find out, you need to decide from the
6 evidence in this case whether Ms. Fontana had
7 chronic obstructive pulmonary disease,
8 emphysema, chronic sinusitis or chronic
9 bronchitis.

10 Now, Dr. Ingram has reviewed all of
11 Ms. Fontana's medical records, all of her
12 pulmonary or lung function tests and some of
13 the deposition testimony in this case.

14 And you will hear him testify, consistent
15 with her medical records, consistent with
16 Dr. Breeden, the pulmonologist, that the
17 plaintiffs hired from Boca Raton, that
18 Ms. Fontana's exposure to environmental tobacco
19 smoke did not cause or aggravate or worsen her
20 sarcoidosis.

21 So let's look at these other diseases.
22 And I don't know, the plaintiffs talked a
23 little bit about the nasal passage and the
24 sinuses and things like that, and I really
25 can't tell whether they're going to claim that

1 Ms. Fontana also had chronic sinusitis. But
2 let's look at what chronic obstructive
3 pulmonary disease is.

4 COPD. COPD. And I said before, remember
5 that we need to keep track of what restrictive
6 diseases you hear about and what obstructive
7 diseases you hear about, because sarcoidosis is
8 a restricttive disease.

9 And so some of the evidence that you'll
10 have to look for is whether she had any
11 evidence of obstructive disease, which would be
12 different from the sarcoidosis.

13 But COPD is an obstructive disease due to
14 bronchitis or emphysema. Again, this is not my
15 definition, this is the definition of the
16 American Thoracic Society. And it's due to
17 chronic bronchitis or emphysema. Chronic.

18 What do we mean, what do doctors mean by
19 the term "chronic"?

20 Well, chronic is different from acute
21 sinusitis or acute bronchitis.

22 "Acute" means sudden or short duration.
23 Now, doctors, when they talk about something
24 being acute and being short, they usually mean
25 less than four weeks. I think that's a long

1 time to have something that they call acute,
2 but that's the definition of "acute".
3 Something that you've had for four weeks or
4 less.

5 "Chronic", on the other hand -- and in
6 order to really know what COPD is, I have to
7 tell you what chronic bronchitis and emphysema
8 is. But chronic bronchitis is a disease that
9 produces chronic productive cough.

10 When I say "productive," I mean that
11 you're spitting up phlegm or whatever, but
12 cough for more than three months, twelve weeks
13 or three months, and for two consecutive years,
14 so that you have to have it for three months in
15 1995 and three months in 1996. And other
16 causes of this chronic cough have to be
17 excluded. That's the definition of chronic
18 bronchitis.

19 Well, do we know why Marie Fontana may
20 have a cough? Sure we do. She's got these
21 fungus growing in her lungs, she's got this
22 restrictive disease that's caused by the
23 scarring. And does she have anywhere in her
24 medical records three months' worth of a cough
25 in two consecutive years? You will never find

1 the diagnosis anywhere in the records of her
2 lung doctors that she had chronic bronchitis.
3 You will never find anywhere in the medical
4 records of her lung doctors that she had
5 emphysema.

6 You want to know why they didn't diagnose
7 her with emphysema? Well, emphysema -- and we
8 talk about these, the doctors will say that
9 it's an abnormal enlargement of the air spaces.
10 So you have enlarged air spaces. And you can
11 see those on X-ray. And you can see the
12 scarring from sarcoidosis on X-ray. And you
13 have enlarged air spaces. You have destruction
14 of the walls so that they become open areas
15 with emphysema.

16 But the thing that makes emphysema
17 different from sarcoidosis is that there is no
18 fibrosis. And what do we mean by fibrosis?
19 Scarring. So we know that Marie Fontana had
20 scarring in her lungs. And we know that what
21 she had wasn't emphysema. And you'll not see a
22 single medical record from Dr. Green or
23 Dr. Coopersmith that says that she had
24 emphysema or chronic bronchitis.

25 And so we don't even have to get to the

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1 second issue, ladies and gentlemen. The first
2 issue is what lung disease she has. Well, she
3 doesn't have chronic obstructive pulmonary
4 disease, because she doesn't have emphysema and
5 she doesn't have chronic bronchitis. And
6 you'll know that by looking at the medical
7 records.

8 If you go to a doctor and he's a
9 specialist, and he's a lung doctor, and he does
10 these test and he treats you, and he treats you
11 for five and six years, the plaintiffs would
12 like you to think that they just, that that
13 doctor just ignored it, that he didn't pay
14 attention to it.

15 Or maybe that he thought she had chronic
16 obstructive pulmonary disease or chronic
17 bronchitis or emphysema and just didn't write
18 it in the records. Now, isn't that a little
19 foolish? The doctor wouldn't write it in the
20 records?

21 The other difference between emphysema and
22 sarcoidosis, I've already said that in
23 emphysema there's no scarring, there's no
24 fibrosis. But in emphysema, you can't breathe
25 out. And in sarcoidosis, you can't breathe in.

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1 Emphysema is an obstructive disease,
2 sarcoidosis is a restrictive disease. And we
3 will show you a medical record, a series of
4 medical records from December 1996 and January
5 of 1997 that say, Ms. Fontana has pulmonary
6 fibrosis, scarring of her lungs. And it will
7 also say that Ms. Fontana, on her Pulmonary
8 Function Tests, you won't have to read any
9 numbers or have anybody interpret this, because
10 on the report it says: Restricted disease, no
11 evidence of obstruction.

12 January 7th, 1997, Pulmonary Function Test
13 from Holy Cross Hospital. And that is a
14 document that you'll be able to look at and
15 take back with you into the jury room.

16 Let me touch briefly here on chronic
17 sinusitis. You know, sinuses are these things
18 up here under your skin that will get blocked
19 when you get a head cold. Everybody gets head
20 colds from time to time, everybody gets their
21 sinuses blocked from time to time. You may
22 even get a sinus infection and have to go to
23 the doctor and get a prescription for an
24 antibiotic to treat your sinus infection. But
25 that is acute sinusitis. That's sinusitis that

1 lasts for four weeks or less.

2 Chronic sinusitis is where you have this
3 kind of infection, or post-nasal drip, or a
4 cough, or inflamed nasal passages continuously
5 for three months or longer. That's the
6 definition of chronic sinusitis.

7 And what we're here about today is not
8 acute sinusitis and not acute bronchitis. What
9 the plaintiffs have to prove to you is that
10 Ms. Fontana had chronic bronchitis or chronic
11 sinusitis. And once again, nothing in her
12 medical records suggests that she ever was
13 diagnosed with chronic sinusitis.

14 Now, you know, the other piece of
15 evidence, we've talked about Dr. Green's
16 records and Dr. Coopersmith's records. We
17 talked about the Pulmonary Function Test that
18 says she didn't have an obstructive disease.
19 But one of the things that we've not talked
20 about yet is Ms. Fontana's own testimony.

21 I asked Ms. Fontana, because we had the
22 right to take her deposition before this case
23 was tried, these four questions:

24 Have you ever been diagnosed with chronic
25 obstructive pulmonary disease? And her answer

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1 was no. And I expect you'll hear that from her
2 again from this witness stand.

3 Have you ever been diagnosed with chronic
4 bronchitis? And her answer was no.

5 Have you ever been diagnosed with
6 emphysema? And her answer was no.

7 Have you ever been diagnosed with chronic
8 sinusitis? And her answer was no.

9 Mr. Hunter argued to you about the Surgeon
10 General and his report and said that ETS causes
11 respiratory disease in healthy nonsmokers.

12 Now, the Surgeon General that you'll hear
13 from, he'll testify in this case, was a Surgeon
14 General in 1979 and '80. He was not the
15 Surgeon General who was responsible for the
16 production of the 1986 report that Mr. Hunter
17 will introduce into evidence.

18 But let's look at what the Surgeon General
19 said in the 1986 report about respiratory
20 disease, because you will have this with you.

21 On Page 10, the Surgeon General writes:
22 It seems unlikely that ETS exposure by itself
23 is responsible for a substantial number of
24 cases of clinically significant chronic
25 obstructive lung disease. "Unlikely." The

1 Surgeon General of the United States.

2 Page 13: The implications of chronic
3 respiratory symptoms for respiratory help as an
4 adult are unknown and deserve further study.

5 And finally, Page 14: Adults exposed to
6 environmental tobacco smoke may have a small
7 change on Pulmonary Function Testing, but are
8 unlikely to experience clinically significant
9 deficits in pulmonary function as a result of
10 exposure to ETS alone.

11 Each one of you knows that being around
12 ETS affects people differently. It may make
13 your eyes water, it may make you sneeze, it may
14 give you a stuffy nose, you may not like it.
15 But does it cause chronic respiratory symptoms?
16 The Surgeon General says: It's unknown and
17 deserves further study.

18 Today, 15 years later, Dr. Ingram from
19 Emory in Atlanta, will tell you that the state
20 of the medical and scientific literature is
21 such that it still has not been shown that ETS
22 causes COPD, emphysema, bronchitis, chronic
23 bronchitis or chronic sinusitis.

24 Ladies and gentlemen, when we come back to
25 you at the end of this trial, we're going to

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1 ask you to find that the plaintiff hasn't met
2 her burden of proof in this case to demonstrate
3 that environmental tobacco smoke in fact was
4 the specific cause of any lung condition that
5 she had.

6 And I think when you hear all the evidence
7 in the case, you'll agree with us that the
8 plaintiff has not satisfied that burden of
9 proof.

10 After the opening statements today,
11 beginning tomorrow, the plaintiff will begin
12 putting on their evidence, but Mr. Reilly is
13 going to talk with you a moment about what some
14 of the evidence specific to environmental
15 tobacco smoke is going to be. But neither he
16 nor I nor Mr. Upshaw or Mr. Geraghty will have
17 another opportunity after today to talk with
18 you and speak with you until the end of the
19 trial, when we get our opportunity to make
20 closing argument.

21 And all that we ask of you is that you
22 keep an open mind. I said yesterday it's like
23 a baseball game, and the plaintiffs are always
24 getting to bat in the top of the inning.

25 Give us our chance to get up to bat to

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1 present our evidence before you make a
2 determination with respect to what diseases
3 Ms. Fontana had, and whether the plaintiff has
4 shown that ETS was the specific cause of her
5 lung disease.

6 Now, with the Court's permission I'll turn
7 it over to Mr. Reilly.

8 Thank you very much, ladies and gentlemen.

9 MR. REILLY: There's something to be said
10 for being last, right?

11 Good afternoon, ladies and gentlemen.
12 It's a quiet bunch.

13 I know it's late. I apologize.

14 On behalf of Tony Upshaw, Bill Geraghty
15 and myself, because we have about a half an
16 hour, and that's all the longer I'm going to
17 take, I appreciate your patience and your
18 attention. As I said, I know it's late.

19 We've divided this up so that only I'm
20 going to talk, even though all three of us
21 would have something to say.

22 Ladies and gentlemen, before I get really
23 started, let me say this to you, it's in the
24 medical records. The evidence in this case is
25 in the medical records. And we're going to

1 help you through them. Like tomorrow, when
2 plaintiffs' counsel brings Dr. Foley, we're
3 going to walk you through the medical records.

4 I know it's long and I know that it's
5 probably not the easiest language you've ever
6 seen. But walk with us through the medical
7 records, because that's where the evidence is
8 in this case.

9 Doctors write notes and write notes and
10 write notes. And at the moment that they're
11 caring for the patient, what do they do? They
12 write down what they think is wrong with the
13 patient. They do it right then. They don't do
14 it years later when there's a lawsuit going on,
15 they do it right then.

16 We'll show you, for example, Mr. Hunter
17 said "peribronchial thickening". Remember he
18 said that? He said Dr. Foley is going to come
19 to talk to you tomorrow, he's going to show you
20 peribronchial thickening.

21 Ladies and gentlemen, watch Foley. See if
22 there is -- I mean, this lady has had more
23 X-rays taken, there's an expression, than who
24 laid a clunk (Phonetic).

25 That just means there's a ton of them.

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1 Watch tomorrow. See if there is one, one
2 radiology report. Radiologists look at these
3 X-rays, pulmonologists look at these X-rays.
4 See if there is one that says "peribronchial
5 thickening". Their whole case hinges on
6 peribronchial thickening. See as we go through
7 tomorrow if there is one peribronchial
8 thickening. And I'm going to -- fair warning,
9 I'm going to take them through it. See if
10 there's one reference. There will be an
11 excuse, Dr. Foley will give you an explanation,
12 oh, the doctors are looking for something else,
13 something else more important, looking for
14 sarcoidosis -- looking for something else.
15 Watch tomorrow.

16 Okay, now, that isn't even what I was
17 going to talk to you about.

18 Let me get set up here.

19 All right. What I came to talk to you
20 about, not that it has a thing to do with
21 sarcoidosis, remember everybody is in
22 agreement, nobody knows what causes.
23 Sarcoidosis, they've looked for 100 years to
24 find an explanation, there have been dawn after
25 dawn after dawn as to what's the cause. No one

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1 knows, there's even science around that says
2 that smoking protects you against getting this
3 disease. I don't recommend smoking to avoid
4 sarcoidosis, but that's what some science
5 shows.

6 Even though smoke, cigarette smoke, has
7 nothing to do with sarcoidosis, the plaintiffs'
8 lawyers have brought up in this case the issue
9 of the exposure of Ms. Fontana to environmental
10 tobacco smoke while she was a flight attendant
11 working for TWA. So that's what I'm going to
12 talk to you about: What was her exposure level
13 to environmental tobacco smoke while she was a
14 flight attendant?

15 Well, I'm going to present evidence to
16 you -- and if I'm too loud, too close, tell
17 me -- what I'm going to tell you about is
18 evidence that's going to be presented in three
19 different categories, okay.

20 The first is nobody has told you what is
21 environmental tobacco smoke yet. So I'm going
22 to tell you and we're going to present evidence
23 about what is environmental tobacco smoke.

24 Then we're going to present evidence on
25 how much Ms. Fontana was exposed to it when she

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1 was working on her flights.

2 And the third category is going to be:
3 How long was she exposed to it? In other
4 words, how many flights did she take in which
5 she was exposed to environmental tobacco smoke?

6 After Mr. Hunter's opening statement, your
7 impression undoubtedly is that she was doing
8 nothing but international flying and that she
9 was on flights five hours, ten hours, going to
10 Europe all the time.

11 Well, let's see what the evidence is
12 really going to be in this case.

13 Okay, what's environmental tobacco smoke?
14 Is it mainstream smoke, the smoke -- these are
15 kind of terms of art -- mainstream smoke, what
16 is mainstream smoke?

17 When a smoker takes a cigarette and takes
18 a puff on it, that's mainstream smoke. People,
19 scientists have measured it, they've identified
20 the chemical components of it. It's highly
21 concentrated. Can you imagine that? Somebody
22 is sucking in to get the air, the smoke, to
23 draw through over the coal and draw through the
24 tobacco and into their mouth.

25 All right, another term that you may well

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1 hear in this case is called sidestream smoke.
2 What is sidestream smoke? Because sidestream
3 smoke has also been measured and it's been
4 tested.

5 Well, if Mr. Hunter is not a drawer, I'm
6 definitely not a drawer. But that's a
7 cigarette, okay, that's the burning end of it.
8 And if I had a red marker, I'd put it in red.
9 In laboratories, people have tested the smoke
10 right at the burning end of the cigarette.

11 Now, nobody inhales sidestream smoke
12 because nobody puts -- that doesn't smell good.
13 Nobody puts a cigarette, the lit end of the
14 cigarette, the coal right up to their noses.
15 But they've tested it to see what's there.
16 That's called sidestream smoke.

17 Okay. So what is secondhand smoke or
18 environmental, what is environmental tobacco
19 smoke or ETS?

20 Well, in a way it's kind of a combination
21 of mainstream smoke and sidestream smoke, in a
22 way. But then, in a big way, it's not at all.
23 ETS is made up of when a smoker exhales and he
24 or she put air in the atmosphere. That's part
25 of environmental tobacco smoke. And the other

1 part is when the smoke moves away from this
2 burning tip and moves off into the atmosphere,
3 that's environmental tobacco smoke, too. So
4 those are the two components.

5 Now, does it have all the chemicals that
6 are in mainstream smoke or in sidestream smoke?
7 Absolutely not. Have people measured
8 environmental tobacco smoke? Absolutely.

9 What's the big difference between
10 environmental tobacco smoke and all these other
11 kinds of smoke? Two major differences, one is
12 that it's aged. What does that mean? Well, it
13 means that as it moves away, it changes
14 chemical composition. Some of the chemicals
15 don't exist anymore, some of the chemicals fall
16 away. That's aging. But the most important
17 difference is that as it disperses, it becomes
18 very, very diluted.

19 Mainstream smoke, very concentrated.
20 Sidestream smoke, less concentrated, but more
21 concentrated than environmental tobacco smoke,
22 which is extremely diluted.

23 How diluted? Well, some of the things
24 they look for and they've tested for that they
25 would ordinarily expect to find in mainstream

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1 smoke or sidestream smoke they can't even find
2 in environmental tobacco smoke.

3 Other things they can only find in such
4 trace amounts, it takes incredible equipment,
5 incredibly sensitive equipment to even measure
6 it. How do they measure it? They measure it
7 in units that are called micrograms and
8 nanograms.

9 Now, when I was in school they taught
10 pounds and ounces, but now we're all metric,
11 right? We're all metric. So a kilogram is
12 2.2, a gram is 1/1000ths of that, and a
13 microgram is one millionth of a gram. A
14 nanogram is a billionth of a gram.

15 Now, does that make any sense to anybody?
16 It didn't to me when I heard it. But this is
17 the way it was explained to me.

18 If I had a cubic meter of air right here
19 and I threw a microgram in it, could you see it
20 with your eye? No way.

21 If I had a cubic meter of air right here
22 and I threw a nanogram in it, could you see it
23 with the naked -- oh, absolutely not.

24 All right, so let me give you an example
25 that will make a little sense to you, you can

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1 visualize. If I make that microgram the size
2 of -- you go to the coffee shop and you get one
3 of those sugar packets, if I make that the size
4 of a microgram, how big do I have to make that
5 cubic meter of air so that when I throw that
6 sugar packet in it it's the same ratio?

7 I have to make that cubic meter of air the
8 size of the Orange Bowl. It's like throwing a
9 packet of sugar into the Orange Bowl.

10 How about the nanogram? How big, if I
11 throw that packet of sugar into the cubic meter
12 of air, how big does the cubic meter of air
13 have to be for a nanogram? You won't believe
14 this. A thousand Orange Bowls. I think that's
15 bigger than Dade County. That's how big it has
16 to be.

17 All right, now you have a sense of what
18 environmental tobacco smoke is and how diluted
19 it is.

20 Second category. What was her level of
21 exposure? Well, to help answer that question,
22 what evidence is going to be presented in this
23 case? And that's why I've prepared this time
24 line. Everybody see that? Okay.

25 Let's run through it real quick. This is

1 what we call the Fontana time line.

2 She begins flying as a flight attendant in
3 1972. She begins flying for TWA. At that
4 point in time, TWA generally divided its flight
5 attendant duties between international and
6 domestic, what we call domestic, in other
7 words, flying around the United States. You
8 could join up either way, you could join up as
9 an domestic or you could join up as an
10 international. She joined up as an
11 international.

12 Now, in 1973, in May of 1973, the CAB --
13 what's that stand for? The Civil Aeronautics
14 Board. Some of you look too young to know what
15 was CAB. But it ran the airlines. It was a
16 governmental agency that controlled, that
17 administered the commercial airlines.

18 The CAB in 1973 decided that they were
19 going to separate smokers from nonsmokers. Did
20 they do it because they were concerned about
21 the health of the nonsmokers? Actually there
22 was a study that had been commissioned by the
23 Federal Aviation Administration and the
24 Department of Health, Education and Welfare.

25 And the results of that came out and,

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1 based on the results of that study, the Civil
2 Aeronautics Board realized the study results
3 said: Environmental tobacco smoke is way too
4 diluted to present a health risk on airplanes
5 to passengers.

6 But it's annoying to a lot of folks. So
7 let's separate smokers from nonsmokers. And
8 that's exactly what the Civil Aeronautics Board
9 did in May of 1973.

10 All right. Ms. Fontana continued as an
11 international flight attendant almost always
12 flying on international flights until 1986.
13 Now, there's going to be testimony in this case
14 that in about 1980 -- I don't have a line on
15 here, but I could just write it on -- she was
16 originally diagnosed with sarcoidosis when she
17 had some gall bladder surgery.

18 And so here is her diagnosis with
19 sarcoidosis. And she continues to fly. 1986,
20 TWA flight attendants go out on strike.

21 I think the machines went out at the same
22 time. They go out, and they're on strike until
23 August of 1988. And during that interim
24 period, Ms. Fontana didn't work as a flight
25 attendant, she went to real estate school, she

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1 got her real estate -- I think she got her
2 license, I'm not sure about that, but she went
3 to work for a real estate agency.

4 Then we have the names of the school she
5 went to, Gold Coast School of Real Estate and
6 where she worked at Andy's Realty, and she
7 worked there for three months. And then the
8 strike was over, flight attendants were called
9 back. But you know what, not all the flight
10 attendants went back to work, as often happens.

11 Thirty percent of TWA's flight attendants
12 didn't come back. They said they wanted to go
13 do something else.

14 What happened in between while the strike
15 was ongoing? Well, in April of 1988 Congress
16 had enacted legislation that went into effect
17 that banned, banned smoking on all domestic
18 flights, in other words, all flights in the
19 United States of two hours or less.

20 What does that mean? It means that if
21 you're going to fly from here to Atlanta,
22 couldn't smoke. Going to fly from here to
23 Seattle, you could smoke.

24 When Ms. Fontana came back to work, that
25 was what her situation was. She could be on

1 flights, and she was -- I forgot to tell you,
2 when she went back to work, no longer were you
3 just flying international or just flying
4 domestic, now they mixed them all up, you could
5 bid on whatever you wanted to fly on.

6 Any flight less than two hours, domestic
7 flight, no smoking. Not too long after she
8 came back to work in February of 1990, Congress
9 had enacted legislation again that banned
10 smoking on all domestic flights. In other
11 words, if you were flying anywhere in the
12 United States, that included San Juan, Puerto
13 Rico, if you flew to a Hawaii, no smoking.
14 Ms. Fontana was flying on both domestic flights
15 and international flights.

16 As you were told a while ago, we actually
17 have -- TWA didn't actually have all the
18 records going all the way back, but they had
19 four years of records, '93, '94, '95 and '96.

20 So we're able to identify exactly what
21 flights Ms. Fontana was on, where she flew to,
22 what the destinations were.

23 And we know the exact number of
24 international flights versus domestic flights.
25 And we know that because of her seniority --

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1 matter of fact, she had enough seniority when
2 she went back to work that she was a flight
3 in-service manager, in-service manager. That's
4 the highest position on the airplane.

5 How do we know that? We know that because
6 she has doctors, she had a doctor -- she had a
7 heart problem, not related to this litigation.
8 But there was concern that she couldn't fulfill
9 the duties of an in-service manager, because
10 the pressure was too great. Too much stress.
11 So her doctor wrote a letter to the airlines
12 saying: Please, she can be a flight attendant,
13 she can fulfill all the duties, we're not
14 worried about her fulfilling all the duties,
15 but don't make her an in-service manager, too
16 stressful.

17 Doctors write letters for patients when
18 they're concerned that their health condition
19 can be impacted by her job. The doctor wrote a
20 letter saying: I'm concerned about this aspect
21 of your your job. Please, TWA, don't make her
22 be an in-service flight manager.

23 At any time, here is the diagnosis, did
24 any doctor ever write a letter to the airlines,
25 ever call the airlines, ever write a note in

1 the medical records of this lady, a note in a
2 chart anywhere: Don't let this lady fly on
3 flights that have smoke on them because we're
4 concerned it could impact her sarcoidosis or it
5 could cause her to develop another disease.

6 Again, look at the medical records. It's
7 a drum beat. I'll probably bore you to death
8 with it this afternoon and I apologize for it,
9 but look at the medical records. None, no
10 where will you find that.

11 All right. And if they had, if they had
12 said that, could she have done it? Could she
13 have just been on domestic flights?
14 Absolutely.

15 You'll see for example that in 1995 out of
16 186 flights that she took, right here, toward
17 the end of her career, out of 186 flights, only
18 37 were international flights. 149 were
19 domestic flights. No smoking flights.

20 Where did she go on her trips? Well, TWA
21 in the last four years of her career, the
22 international flights included Athens Greece,
23 Barcelona, Spain; Cairo, Egypt; Frankfurter,
24 Germany; Madrid Spain; Munich, Germany; Nice,
25 France; Paris, France; probably you know where

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1 these are, Rome, Santa Domingo, the Dominican
2 Republic, Telaviv.

3 Domestic flights, Atlanta, Boston, Dallas,
4 Denver, Houston, Las Vegas, Miami, New York,
5 Orlando, Phoenix, Portland, Salt Lake City, San
6 Francisco, Seattle, St. Louis and West Palm
7 Beach.

8 I don't know if they compare to Paris, but
9 not bad spots.

10 All right. Now you have a sense of what
11 her level of exposure was based on when she was
12 flying and where she flew.

13 Let's talk now about what the exposure
14 level was when she was on those planes. Now,
15 what evidence are we going to present on that?
16 We're going to bring to you a fellow by the
17 name of Michael Ogdon.

18 MR. REILLY: Dr. Ogdon is employed by the
19 RJ Reynolds Company. He is a fellow -- he's a
20 scientist and he has been responsible for the
21 creation of the methods of measuring
22 environmental tobacco smoke in various
23 locations, various situations. That has been
24 adopted by literally all the people that do
25 that kind of work. He's a recognized super

1 expert in that field.

2 The government follows his pattern, his
3 methodology, his technique, other folks that do
4 include the American Chemical Society, the
5 Occupational Institute of Safety and Health.

6 Those are names that just don't fall off
7 my tongue, but those are the kind of people
8 that follow his methodology. He's the guy
9 that's going to come here and talk to you about
10 what is ETS. Then he's going to talk to you
11 about the measurements of environmental tobacco
12 smoke.

13 They actually put machines right on
14 airplanes, right on commercial flights. They
15 put those machines right next to passengers,
16 right in the aisle. I mean, he'll tell you
17 where they're positioned. They're not where
18 people can trip over them or anything. He'll
19 tell you exactly, no more guesswork, no more
20 flight attendants coming in and saying: Oh, it
21 was terrible. We have the actual measurements.

22 The government studied this, private
23 industry has studied this, the airlines have
24 studied this. No more guesswork. You'll be
25 able to know exactly what the measurements of

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1 environmental tobacco smoke have been
2 throughout the airplanes. And he's going to
3 tell you about it.

4 He's going to tell you the results of the
5 studies, and he's going to tell you that he has
6 reviewed -- this isn't something in the
7 abstract, he's going to tell you that he's
8 reviewed the flight history of Ms. Fontana.

9 And Mr. Hunter talked about cigarette
10 equivalents. Dr. Ogdon is going to give you
11 the cigarette equivalents not for some
12 imaginary flight attendant, but for
13 Ms. Fontana. He's going to tell you that based
14 on her work history that her cigarette
15 equivalent -- what does that mean? It means
16 her environmental tobacco smoke exposure as if
17 she had smoked that number of cigarettes. What
18 is hers? It's two to five cigarettes a year.
19 A year. Now, Dr. Ogdon is going to address the
20 methodologies that Dr. Hammond is going to
21 testify about in her video. And he's going to
22 explain what's wrong with the methodology.
23 He's going to explain who uses, if anybody,
24 that, methodology. If anybody.

25 What Mr. Hunter didn't tell you about in

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1 Dr. Hammond's testimony is she's going to
2 acknowledge that a flight attendant's exposure
3 could vary 100 fold from what she's telling
4 you, 100 fold. That's not 100 percent, that's
5 100 times. She's going to admit that the
6 exposure level of a flight attendant is
7 one-fifth the exposure level of somebody who
8 lives at home with a spouse that smokes.

9 And you know, I couldn't make this -- I
10 wouldn't use this language, not appropriate
11 language, but I wouldn't use this language.
12 She's going to tell you that if you move 7 rows
13 away from the smoking section on an airplane by
14 her own measurements, you can't find -- they
15 look for a couple of different markers, you
16 know, they look for nicotine, they test and put
17 an instrument there and look to see using
18 nanograms and micrograms and picograms. I
19 didn't even mention that because it's too tiny.
20 But they check to see, can we find a nanogram,
21 a microgram? Couldn't even find one.

22 How about nicotine, could they find that?
23 She's going to tell you seven rows away from
24 the smoking seats on these airplanes they
25 measured the nicotine. The amount was I think

1 her words are tiny, teeny, weeny, weeny.
2 That's the level.

3 We're also going to bring Dr. Teaf,
4 Dr. Christopher Teaf. Dr. Teaf is a professor
5 of toxicology at Florida State University in
6 Tallahassee. He is the director, the associate
7 director of the center of Mayo Medical and
8 Toxicological Research. He is going to come
9 here and assess the health risk to Ms. Fontana
10 for flying on airplanes. And he's going to
11 explain to you something about the content of
12 PELS.

13 I know nobody has ever heard of a PEL.
14 What does that stand for? Permissible -- boy
15 is that poor penmanship -- exposure limit.

16 He's going to tell you that in the
17 Occupational Safety and Health Administration,
18 OSHA, has been directed by Congress to insure
19 that Americans workers work in safe workplaces.
20 And one of the things they have to do is to
21 identify chemicals in the atmosphere, in
22 workplaces that present health risks to
23 workers. And then they have to decide what is
24 a safe level of those chemicals for workers to
25 work in. And when they establish that safe

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1 level, it's called a permissible exposure
2 limit, a PEL.

3 Now, have they ever established a PEL for
4 environmental tobacco smoke? No. But they
5 have established PELs for some of the chemicals
6 that are found in trace amounts in
7 environmental tobacco smoke.

8 For example, carbon monoxide. Dr. Teaf
9 will come here and he will tell you that
10 Ms. Fontana, based on the exposure levels on
11 airplanes, would have to work for two years as
12 a flight attendant to get the same level of
13 exposure to carbon monoxide that an American
14 worker working in an atmosphere with a
15 permissible exposure limit eight hours a day
16 for one week would have. She's got to work for
17 two years when the regular worker works for a
18 week. And that is the lowest PEL level that
19 she's exposed to. Other chemicals, the PELs
20 are like 10 years, 20 years, 100 years. He's
21 also going to do a comparison what of what the
22 exposure level of flight attendants is versus
23 other occupations like people working in bars
24 or people working in restaurants or people that
25 live in homes with spouses that smoke. He's

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1 going to do all that for you.

2 Now you're going to get a sense of what
3 the exposure level is like for Ms. Fontana on
4 airplanes. And it's all based on studies, not
5 guesswork, not what they call anecdotal, not
6 based on flight attendants coming in and -- by
7 the way, those flight attendants, pay close
8 attention to who they are and who they're
9 represented by.

10 THE COURT: About two, three minutes.

11 MR. REILLY: We're also going to bring
12 Joyce Coleman who worked for TWA as a manager
13 of in-flight services. She's going to tell you
14 all about what it's like to be a flight
15 attendant. And all about Ms. Fontana's rights
16 as a flight attendant.

17 Let me tell you that as his honor
18 explained to you when you were seated, you now
19 are going to perform the task which serves as
20 the backbone of our judicial system. Don't
21 lose focus of what this case is really all
22 about. It isn't about exposure levels, it's
23 about what is the illness that Ms. Fontana
24 suffers from today?

25 Look in the records with us as we go

1 through the evidence in this case, why is she
2 getting a lung transplant? We're going to show
3 you the records. The word that is repeated
4 over and over and over and over is sarcoidosis,
5 sarcoidosis, sarcoidosis.

6 Unfortunately, Ms. Fontana is one of those
7 folks who gets this disease, we don't know why
8 people get it, in whom the disease progresses,
9 nobody knows why it progresses, they have no
10 cure. They have a treatment, does it work?
11 Obviously not. Unfortunately, if you're one of
12 those people and she's in that group, that are
13 most susceptible, she's in the group in which
14 it progresses most often, no one knows why.
15 She has arrived at what they call end stage
16 sarcoidosis. It's a sad, sad fact. Look in
17 the lung transplant medical records, that's the
18 word you will see, sarcoidosis. Will you find
19 any reference to environmental tobacco smoke?
20 Zero. Zero. So ladies and gentlemen, on
21 behalf of Philip Morris, Lorillard, Brown &
22 Williamson, RJ Reynolds, we thank you for
23 serving as the backbone of our judicial system.
24 I look forward at the end of this case when I
25 get to address you again in my closing argument

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1 when I get to review with you whether or not
2 this didn't turn out to be the evidence that I
3 said it was going to be in this case.

4 Thank you.

5 THE COURT: Take that time line down,
6 please.

7 MR. REILLY: Yes, Your Honor.

8 THE COURT: Ladies and gentlemen, that's
9 the end of your labors for today. Do me a
10 favor and leave your notepads on the seats.
11 And remember my instructions earlier today.
12 I'm not going to repeat them to you verbatim,
13 I'm not even going to give it a good try. I
14 know you'll remember them.

15 Remember one thing, that there has been
16 some media attention to this case and not to
17 look at it or read any reports about this
18 trial. With that, just have a good evening.
19 And if you come to the second floor tomorrow at
20 about 9:45, I should be finished with my early
21 morning calendar, and we should be able to
22 start by about 10:00. Maybe a little after.
23 So I don't want you to get there any earlier
24 than 9:45.

25 Other than that, have a good evening and

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1 we'll see you tomorrow.

2 (The jurors exited the courtroom.)

3 THE COURT: Have a seat.

4 MR. WEINSTEIN: Your Honor, most
5 respectfully, I mean, I really hate to say
6 this, but tomorrow when I get the actual
7 transcript I'm going to have to ask for
8 sanctions against Mr. Reilly. In a very
9 sophisticated way he went against just what you
10 cautioned Mr. Engram on and that goes to
11 choice. Very sophisticated. They sneak things
12 in so quickly, you almost -- I recognized it
13 right away, but it would have caused more
14 problems, Judge, it would have caused more
15 attention, so I just sat back and waited. But
16 I got very angry at that moment.

17 You know, judge, you cautioned them and
18 said to Mr. Engram, if you bring this up again,
19 you're going to have to deal with me, you said
20 this to Mr. Engram and Mr. Reilly was around.
21 And I'm talking about the issue of choices.
22 They don't say it, but they throw it right
23 there. They throw it on the table for the jury
24 in a sophisticated way to consider. Mr. Reilly
25 clearly said when the strike was over, the

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1 plaintiff came back, but 30 percent didn't.
2 Now, Judge, he could have said when she came
3 back, she came back to work and then gone on
4 with it. Why would he say 30 percent of the
5 flight attendants didn't come back?

6 THE COURT: Let me cut you off. It's
7 almost 5:30. I'll look at your motion
8 tomorrow. And I also made some marks on my
9 transcript here. So we'll deal with it
10 tomorrow.

11 Anything other than this that?

12 MR. WEINSTEIN: I only brought it up
13 because I didn't want Your Honor to think we
14 missed that.

15 THE COURT: I wouldn't do that.
16 Anything else at this point in time?

17 MR. HUNTER: No, sir.

18 THE COURT: We'll be in recess.

19 (A recess was taken at 5:25 p.m.)
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